BENGAL SECRETARIAT

THE INDIAN LAW REPORTS,

CALCUTTA SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT CALCUTTA AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM ALL OTHER COURTS IN BRITISH INDIA NOT SUBJECT TO ANY HIGH COURT.

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JUDGES OF THE HIGH COURT.

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CORRIGENDA.

Page 7, line 14, *for* "lease," *read* "leave."
" 33, heading to note, *for* "free," *read* "true."
" 98, line 4 of head note, *for* "obtained," *read* "purchased."
" 337, line 10, *for* "Sched. III," *read* "Sched. II."
" 358, line 16, *for* "Sibson," *read* "Simpson."
" 385, note (1), *for* 44, *read* 47.
" 393, note, *for* "J. S. Davies, Esq.," *read* "Col. Davies."
" 470, heading to note, *for* "Act XI of 1861," *read* "Act XI of 1865."
" 470, note, *for* "H. M. Boddam, Esq.," *read* "Col. Boddam."

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THE

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APPELLATE CIVIL.

Before Mr Justice Markby and Mr. Justice Mitter.

RAMDOYAL KHAN AND OTHERS (PLAINTIFFS) *v.* AJOODHIA RAM KHAN AND OTHERS (DEFENDANTS).*

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June 10.

Civil Procedure Code (Act VIII of 1859), *s.* 26, *cl.* 4 *and* 5, *and ss* 135 139, *and* 141—*Amendment of Plaint—Allegations of Facts—Limitation—Act IX of* 1871, *s.* 19—*Personal Equity.*

In 1817 the ancestor of the plaintiffs had obtained from the zemindar a maurasi istemrari lease of a certain portion of his property. In 1837 the entire zemindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder, who thereupon granted a lease for a term of twenty years to *W*. This revenue sale was never set aside; but in 1842 the Government restored the estate to the Rajah zemindar with all the prior incumbrances, but subject to his confirming the lease to *W*. In 1844 the father of the plaintiffs brought a suit to recover possession of their tenure, but the suit was dismissed by the Principal Sudder Ameen, on the ground that the right to sue had not accrued, and could only arise on the expiration of the lease to *W*. This judgment was reversed by the Sudder Dewany Adawlut, but was restored and affirmed on appeal by the Judicial Committee. In the meantime, and before the expiry of the lease to *W*, owing to certain fraudulent transactions on the part of *A*, who had got into possession of the estate as the purchaser of the interests of certain mortgagees of the Rajah, the property was again put up to sale for arrears of Government revenue, and was purchased by *M*, a party to the transactions abovementioned. The Rajah, however, succeeded in getting this sale reversed in 1866, and obtained possession of his estate in 1871. In a

* Regular Appeal, No. 308 of 1874, against a decree of the Judge of Zilla Midnapore, dated the 25th of August 1874.

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suit, instituted on the 23rd October 1873, against the Rajah and certain other parties, to whom he had granted a patni lease, the plaintiffs alleged that the sale of 1837 was set aside by Government as illegal, and that consequently their tenure had revived; that the effect of the Principal Sudder Ameen's decision, confirmed by the Privy Council, was to postpone their right to obtain possession of their tenure, until after the expiration of the lease to *W*; that when that lease expired, the property was in the possession of *M*, of the fraudulent character of whose title they had no knowledge; and that their right to sue in the present case consequently arose only in 1871. The defence was that the plaint disclosed no cause of action; that the cause of action, if any, was barred by the law of limitation; and that the tenure was destroyed by the proceedings connected with the sale in 1837, which was never set aside. The Judge held that the plaint disclosed a cause of action which arose in 1837, and that the suit was consequently barred. He accordingly dismissed the suit without taking any evidence.

On appeal to the High Court, it was admitted on the part of the plaintiffs that the sale of 1837 was never set aside; but it was contended that the restoration of the zemindari to the zemindar, "with all the former incumbrances," gave rise to an equity of a personal character against the Rajah, and those taking under him with notice of the plaintiffs' title, to restore the plaintiffs' tenure, which equity fastened upon him on his obtaining actual possession of the estate; and that therefore the cause of action accrued only in 1871. On the part of the defendants it was objected that the plaintiffs had no right to make a new case in appeal, and inasmuch as the equity which was now sought to be fastened on the zemindar was never raised in the pleadings it could not now be set up. *Held*, that, under ss. 139 and 141 of the Civil Procedure Code, the plaintiffs might be allowed to amend their case in any stage before a final decision: and inasmuch as, if the plaintiffs' case as so amended were proved, the suit would not be barred, it was necessary for the determination of the question of limitation that the case should be remanded to the lower Court for trial.

Semble.—S. 19 of Act IX of 1871 is applicable only to those cases where the fraud is committed by the party against whom a right is sought to be enforced.

From cl. 4 and 5 of s. 26 of Act VIII of 1859, it would appear that where a whole estate bearing a name is sued for, the boundaries need not be given.

Per MITTER, J. *Quere.*—Whether, if the plaintiffs' case were established, their claim would not be saved from the operation of the Law of Limitation by s. 29, Act XV of 1845.

SUIT for possession in istemrari maurasi right.

The material allegations of fact, contained in the plaint, were as follows:—Chuni Lall Khan, the grandfather of the first four plaintiffs (called in the judgment of the High Court the

Khan plaintiffs, obtained in the year 1817, from the zemindar, whom the first defendant represented, a maurasi istemrari pottah of the lands to which the present suit related at a fixed rent of Rs. 2,250 per annum, under which lease he was in possession in 1837. In that year, the zemindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder for one rupee. The Government then granted an ijara pottah of the entire zemindari for twenty years to certain persons called in the judgment of the High Court the Watsons. The plaintiffs then proceeded to allege, that whilst their father was attempting to institute a suit for setting aside the aforesaid illegal auction sale, "the Government, knowing that the auction-sale was illegal and invalid, set it aside, relinquished its title under the purchase, and made over the zemindari to the zemindar with its previous incumbrances and settlements," subject to an arrangement between the Government and the zemindar, that the latter should confirm the ijara granted by the Government to the Watsons of that portion of the property which was covered by the istemrari pottah, and was called the jungle mehals. This happened in the year 1842. In conformity with this arrangement, the Rajah (the first defendant in this suit) granted to the Watsons, on the 7th June 1842, an ijara pottah for a term of twenty years, in confirmation of the ijara granted to them by the Government. In the year 1844, Sreemunto Lall Khan, the father of the Khan plaintiffs, instituted a suit in the Midnapore Principal Sudder Ameen's Court, for recovery of possession of his maurasi tenure. The Principal Sudder Ameen, by his decision of the 17th November 1846, dismissed the plaintiffs' suit, holding that "it appears from the records of the case, and the Rajah defendant's ikrar, *i.e.* answer, that the claim was established, but the plaintiff was not entitled to recover possession during the term of the ijara to the Watsons. The plaintiff should have instituted his suit for recovery of possession with damages on the expiry of the term of the ijara, and after the Rajah defendant had come into possession." On appeal by Sreemunto Lall Khan, the Sudder Dewany Adawlut reversed the decision of the Principal Sudder Ameen, and, on the 13th July

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1848, gave him a decree, under which he took possession (1). The Watsons thereupon preferred an appeal to the Privy Council, who reversed the decree of the Sudder Dewany Adawlut, and restored that of the Principal Sudder Ameen, in consequence of which the Watsons re-entered into possession ousting Sreemunto Lall Khan. The decree of the Privy Council was made on the 3rd February 1854 (2). Sreemunto Lall Khan died in 1858. But as the effect of the Principal Sudder Ameen's decision was to keep in abeyance the right of the Khan plaintiffs as the heirs and representatives of their father until the expiration of the Watson's lease, they would have instituted their suit on its expiry on the 22nd July 1860, but were prevented by certain proceedings which arose out of a mortgage made in favor of certain parties called in the judgment of the High Court the Debs. The mortgagees had sold their right and title to one Mr. Abbott, who took possession of the zemindari before the Khan plaintiffs' right to institute the suit on the expiry of the Watson's lease had opened. The plaintiffs alleged that Abbott, having privately arranged to sell the zemindari to one McArthur, and to secure to the latter such a title as would enable him to avoid all the incumbrances and settlements which had been made by the former zemindar, colluded with the latter with a view to deprive the plaintiffs and the Rajah defendant of their rights by means of fraud and artifice, and defaulted to pay the Government revenue, and fraudulently and illegally brought the zemindari to sale on the 29th April 1848 when McArthur purchased it and took possession of the whole zemindari. As however Sreemunto Lall Khan and the Khan plaintiffs were ignorant of the above acts of collusion and fraud, by which the revenue sale in 1848 was brought about, they were unable to bring a suit for annulment of the above fraudulent auction-sale; and, as the zemindari was not in the khas possession of the Rajah defendant, they could not bring a suit for recovery of possession on the determination of the Watson's lease. On the 23rd April 1861, the Khan plaintiffs sold to Srinarain Bysack a moiety of their interest in the tenure, and let the other half in ijara to him. Srinarain Bysack

(1) 7 Sel. Rep., 516. (2) 5 Moore's I. A., 447.

brought a suit against Sidhi Nazir Ally Khan, who had got into possession of the property after McArthur, for ejectment in the Supreme Court. This suit was however withdrawn. Subsequently, on the 29th July 1871, Srinarain Bysack reconveyed his entire interest to the Khan plaintiffs, who afterwards conveyed portions of their interest to the other plaintiffs. When the Rajah defendant became aware of the fraudulent character of the auction-sale of the 29th of April 1848, he instituted a suit in the District Court of Midnapore against Sidhi Nazir Ally Khan and others, the parties then in possession, for recovery of the zemindari, and ultimately obtained a decree for possession and mesne profits on the 29th of September 1866 by reversal of the sale. This decree was upheld by the High Court on the 4th September 1867. An appeal was preferred to the Privy Council, but it was not prosecuted. In execution of the decree obtained by the Rajah defendant he finally got into possession of the zemindari on the 11th of July 1871. The plaintiffs submitted that as the fraudulent revenue sale, in consequence of which they had been kept out of possession, and had been also unable to sue for recovery of possession, had been set aside, their right and title had become valid as before; and that inasmuch as they were not aware of the fraud practised by Abbott and McArthur, until the decree obtained by the Rajah, their cause of action accrued only when he obtained possession on the 11th July 1871.

The plaintiffs joined the other defendants in the suit, on the ground of their having taken a patni lease from the Rajah defendant with knowledge of the plaintiffs' title.

The Rajah and the lessee defendants filed separate written statements, setting out at great length the facts of their case. But the chief objections raised by way of defence, and with reference to which the case was argued in the Court below, as well as the High Court, were as follows:—(1), that the plaint disclosed no cause of action; (2), that the suit was barred by limitation; (3), that the revenue sale of 1837, and the consequent proceedings before the Collector by which it was confirmed, had the effect of destroying the plaintiffs' tenure; (4), and that

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the question in the suit was *res judicata*, having been finally decided by the Privy Council in 1854.

The following were the material issues framed by the Judge:—

3. Were the plaintiffs entitled to obtain possession under their lease in consequence of the Rajah's restoration to possession? 9. Did the plaint disclose any cause of action, and, if so, when did it arise? 10. Was the suit barred by limitation? 11. Whether or not the plaintiffs' tenure was extinguished by the revenue sale of 1837 and the proceedings consequent thereto, and whether it could be revived otherwise than by a reversal of the sale by competent authority? 12. Was not the question finally decided by the decision of the Privy Council on the 3rd February 1854?

The Judge held that the plaint disclosed a sufficient cause of action, but that it arose in 1837, and consequently the suit was barred by limitation. He accordingly dismissed the suit without taking any evidence.

The plaintiffs appealed to the High Court.

Mr. *Kennedy* (Baboos *Ambica Churn Bose* and *Bhoyrub Chunder Banerjee*) for the appellants.

Mr. *Woodroffe* and Mr. *Bonnerjee* for the Rajah respondent.

The *Advocate-General*, offg. (Mr. *Paul*) and Mr. *Evans* (Mr. *Allan* and Baboo *Bhowany Churn Dutt* with them) for the lessee respondents.

Mr. *Kennedy*.—The plaintiffs' cause of action clearly arose in 1871 when the Rajah obtained possession of his zemindari. The suit, therefore, is not barred by the law of limitation. The Principal Sudder Ameen expressly held that the plaintiffs' right to sue could only arise on the expiry of the Watson's lease and when the Rajah should obtain possession of his estate, and this decision was upheld by the Judicial Committee (1). The plaintiffs' right was therefore held in abeyance until 1871. The moment the estate came back into the hands of the Rajah, an equity fastened upon him to replace the plaintiffs in the position which their ancestor occupied previous to the revenue sale of 1837. This sale was not set aside in the sense of a reversal as stated in the plaint; and the proceed-

(1) 5 Moore's I. A., 447.

ings before the Collector by which the sale was confirmed had, no doubt, the effect of destroying the tenure. But the Government had returned the estate to the Rajah with all its former incumbrances. The plaintiffs have, upon the basis of the very arrangement by which the Rajah got back his zemindari, a personal equity against him. [Mr. *Woodroffe*.—No such question is raised in the pleadings; and it cannot be now raised for the first time.] The facts upon which our equity arises are sufficiently stated in the plaint. (The learned Counsel then stated the facts of the plaintiffs' case substantially as in the plaint, with this variation that, whilst in the plaint it was alleged that the sale of 1837 was set aside as illegal, he admitted that there was no reversal.) These facts show sufficiently what our equity is. The Principal Sudder Ameen reserved lease to the plaintiffs to institute their suit after the expiration of the Watson's lease. [Mr. *Woodroffe*.—Any provision of the law of limitation notwithstanding?] Limitation does not run until the right arises; the plaintiffs' right to regain possession of their tenure was dependent upon the Rajah's actual possession of the estate. The zemindari was restored to him by Government with all its prior incumbrances. It will be seen from this condition that he did not get it back simply for his own benefit, and therefore there is an implied trust on the part of the Rajah to replace the plaintiffs in their former tenure—*Keech* v. *Sandford* (1). The Irish Equity cases on the analogous question of a redemption by the tenant serve to illustrate the equity contended for in this case—*Kent* v. *Roberts* (2), *Jones* v. *Kearney* (3), and *Nesbitt* v. *Tredinnick* (4). What was decided by the Privy Council in effect was this, that, immediately on the termination of the lease, the plaintiffs should be put back into possession of their tenure by the Rajah, but when the lease expired (*i.e.*, in 1860), there was nobody to give them that possession. [Mr. *Woodroffe*.—In the plaint it is stated that Abbott was in possession, and that therefore the plaintiffs did not bring the suit.] What the plaintiffs say is this, that the circumstances connected with Abbott's purchase and the auction-sale to McArthur prevented them bringing a suit

(1) 1 White & Tudor's L. C., 44.
(2) 3 Ir. Eq. Rep., 279.
(3) 1 Drury & Warren, 134.
(4) 1 Ball & B., 29.

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against the Rajah on the expiry of the term of Watson's lease. As against the Debs the mortgagees, or purchasers from them, the plaintiffs could not have asserted any title; those persons were purchasers for valuable consideration without notice. But as soon as the Rajah succeeded in obtaining a reversal of that particular sale, their right revived as against him and all those claiming under him. The equity which is sought to be established was recognised in express terms by the Principal Sudder Ameen, and was affirmed by the Privy Council. With reference to the right of suing, the Principal Sudder Ameen made a reservation, and that reservation, it is submitted, was also affirmed; for otherwise the affirmance would be absolutely futile. [MARKBY, J.—In *Watson* v. *The Collector of Rajshahye* (1) the Privy Council strongly objected to give effect to such a reservation.] In this case there is something more than a reservation, for it proceeds upon an express admission by the Rajah of the plaintiffs' title. The plaintiffs were not aware of McArthur's fraud until the Rajah's decree in 1806. Limitation therefore cannot run from 1860, even if it be supposed that the right to sue arose immediately on the expiry of the Watson's lease—*Dwarkanath Bhooya* v. *Rajah Ajoodhyaram Khan* (2). [MITTER, J.—That case was under Act XIV of 1859. Act IX of 1871 is different.] S. 19 of Act IX of 1871 is for the purposes of my argument identical with s. 9 of Act XIV of 1859. During the pendency of the proceedings to set aside the fraudulent sale, in which McArthur became purchaser, limitation did not commence to run. It was only when Rajah Ajoodhyaram Khan obtained possession of his property, and, instead of replacing the plaintiffs in their original tenure, began to deal

(1) 13 Moore's I. A., 160.

(2) Regular Appeal, 257 of 1872, decided on the 22nd of December 1873. In this case, which also proceeded upon the fraudulent sale to McArthur, it was held by Markby and Birch, JJ., that where the allegations in a plaint sufficiently stated that the plaintiffs being entitled to property and being in enjoyment thereof were ousted therefrom under color of a fictitious revenue sale in pursuance of a fraudulent contract, the fraud being so contrived as to make plaintiffs believe that they had no right of action at all, and the allegations were proved, the fraud would entitle the plaintiffs to claim the benefit of s. 9 of Act XIV of 1859.

inconsistently with their rights, that his possession became hostile and adverse to them.

Mr. *Woodroffe* for the Rajah respondent.—The Principal Sudder Ameen had no power to make the reservation contended for—*Watson* v. *The Collector of Rajshahye* (1). The Privy Council simply affirmed the decree dismissing the suit of the plaintiffs' father. They say nothing about the suit not being maintainable until the expiration of the lease to the Watsons; for, if the sale were illegal, as the plaintiffs allege in their plaint, Sreemunto Lall Khan was entitled to bring his suit at once. But, as a matter of fact, the sale of 1837 was not illegal, and, as has now been admitted, was never set aside; the title acquired by the Government was valid; and the Government simply transferred the rights it had acquired to the Rajah as an act of grace. The Irish cases cited by Mr. Kennedy have no application; they are founded on special statutes. In the present case, there was a total forfeiture of the rights of the plaintiffs in consequence of the revenue sale, and that sale having never been set aside, the forfeiture was not relievable either at law or equity. The sale acted as a complete annulment of the tenure; and the tenure could never be revived or restored into being except by a fresh grant. [MARKBY, J.—Supposing the Government restored the zemindari, subject expressly to the right of the Watsons and the prior incumbrances, would not the tenure revive?] The tenure would not revive; but the plaintiffs would get a right to demand possession and a right to sue on refusal. [MITTER, J.—The evidence has not been taken yet, and it is difficult to say what the plaintiffs can prove, and what they cannot; but, supposing they fail to prove that the sale was illegal, but they succeed in proving that the zemindari was made over on condition of restoring the prior incumbrances, would not they be entitled to recover their tenure?] It is submitted they would not; they would only get a right of action. Besides, the compromise was only between the Rajah, the Government, and the Watsons. The plaintiffs were no parties to it; and that was

(1) 13 Moore's I. A., 160.

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the reason why the Judicial Committee held that it in no way affected their rights. The Sudder Dewany Adawlut wanted to fix an equity; but their decision was reversed. But, supposing the plaintiffs are entitled to the benefit of that arrangement, why did they not sue in 1860? It is no answer to say that it was owing to the Rajah not being in possession. His right was existing. [MARKBY, J.—The contention of the plaintiffs is that their right was not against the world, but a personal equity against the Rajah. Mr. *Kennedy*—and those who took under him with notice.] As soon as those words are added, they dispose of the contention; for if that was so, the plaintiffs would be entitled to recover against the Rajah's mortgagees as well as the Rajah himself. If they take under the arrangement, it is a legal right and not an equity. An equity would only arise, if the arrangement had been made behind their backs. The suit ought to have been brought within twelve years from the date of the restoration of the zemindari to the Rajah, or at all events from the expiry of the Watson's lease, under cl. 141, Schd. II, Act IX of 1871. [Mr. *Kennedy*.—cl. 145.] The plaintiffs cannot take advantage of s. 19 of Act IX of 1871; they were perfectly aware of their title, and were therefore bound to sue when their right to sue arose. It has been contended for the plaintiffs that the fraud kept out of possession the party against whom the plaintiffs had a personal right. But they were not kept out of the knowledge of their right; in fact, nothing done by Abbott and McArthur could affect their right. They cannot, therefore, escape from the operation of the law of limitation. In conclusion, it is submitted that the plaintiffs should not be allowed to start a new case in this Court. The equity which they now seek to fasten upon the Rajah was never raised in the pleadings—*Eshen Chunder Sing* v. *Shama Churn Bhutto* (1).

The *Advocate-General* for the *lessees*.—The Irish cases cited do not apply, as they are founded on particular statutes; and *Keech* v. *Sandford* (2) proceeded on grounds of public policy. In this case, Sreemunto Lall Khan, a person who

(1) 11 Moore's I. A., 7. (2) 1 White & Tudor's L. C., 44.

was *sui juris*, does not take action when his right accrues; he remains quiescent until long after the period of limitation has elapsed. Should his representatives be now allowed to come into Court, and disturb the titles of those persons whom he allowed by his quiescence to deal with the Rajah under the belief that he had no more subsisting title? Even if the fraud committed by Abbott was a fraud against the plaintiffs, they were bound to come into Court with reasonable diligence—*Chetham* v. *Hoare* (1). S. 19 of Act IX of 1871 cannot save the plaintiffs' suit from being barred, for that section does not apply. In order to make it applicable, it must be assumed that the fraud of Abbott was tantamount to the fraud of the Rajah. How could that be? The fraud was committed against the Rajah, and it is rather difficult to see how the fraud of another person to his injury can be said to be his fraud.

Mr. *Kennedy* in reply.—Art. 141, Sched. II of Act IX of 1871, would only apply, if the right of the plaintiffs were in its nature reversionary. But it is not so. What they claim is a personal equity against the Rajah and those claiming under with notice of the plaintiffs' title.

The following judgments were delivered:—

MARKBY, J.—In this case, the plaintiffs sue to recover, in istemrari maurasi right, possession of an extensive tract of country, in Zilla Midnapore. The property is of very large value, and the appeal has been very fully and ably argued.

It is necessary to state in what shape the appeal comes before us. The plaint is not at all in the form prescribed in Act VIII of 1859, but, as customary in the mofussil, is a plaint and written statement combined. The plaint was admitted, and the defendants having filed their written statements, the case then came on before the District Judge for settlement of issues. Upon that hearing, the District Judge, without taking any evidence, dismissed the suit. Against this decision, the plaintiffs appeal.

One of the questions which was argued before the District

(1) L. R., 9 Eq., 571.

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Judge, and which he decided, was whether the plaint disclosed a cause of action. The District Judge held that it did disclose a cause of action. Against this, there is no appeal. The District Judge further held that the cause of action arose in 1837, and that the suit was barred by limitation, and against this the plaintiffs appeal.

I am not quite sure from the judgment of the District Judge what he considered the plaintiffs' cause of action to be. There can be no doubt that the plaint does disclose one cause of action, namely, that the person, through whom the plaintiffs claim, was, in the year 1837 or thereabouts, dispossessed by the auction-purchaser, under an illegal sale for arrears of Government revenue, which was afterwards set aside. But that this was not the sole view put forward in the Court below is clear from the 3rd and the 11th issues.

It therefore becomes necessary to consider what the plaintiffs' cause of action is, and Mr. Kennedy, on behalf of the plaintiffs, now states his case as follows:—It is necessary to set it out in full, as the terms of it will, no doubt, form the subject of much discussion hereafter.

[After stating the facts as above, his Lordship continued]:—This is the case of the plaintiffs. Besides stating the above facts, the plaintiffs expressly admit that by the proceedings which took place before the Collector, consequent upon the sale for arrears of revenue of 1837, the maurasi tenure, which was then vested in Sreemunto Lall Khan, was put an end to. But they contend that, in consequence of the arrangement between the Rajah, the Government, and the Watsons, Sreemunto Lall Khan had a right as against the Rajah and all persons claiming under him, other than the purchasers for valuable consideration without notice, to be restored to his tenure.

This right they contend, the Principal Sudder Ameen, by the decision of July 1848, declared to be suspended, until the expiration of the twenty years' ijara granted to the Watsons. They further say that this right was a personal equity against the Rajah, which could not be enforced when the ijara expired against the mortgagees of the Rajah because they had no notice of it. They say, moreover, that this equity was destroyed

by the sale for arrears of revenue in 1848, but that it arose again when Ajoodhyaram recovered possession of the estate under the decree of the District Judge of Midnapore, affirmed by the High Court as abovementioned.

It was very strenuously argued on the part of the respondents, especially by the learned Counsel who appeared for the Rajah, that the plaintiffs could not be allowed to put their case in this way; and as it was alleged that to allow them to do this would not only be contrary to law, but also would be a great hardship to the defendants, I think it right to state how in my opinion the matter actually stands.

The suit, it must be remembered, was (as already stated) disposed of by the Court below at the first hearing upon the settlement of issues—not a tittle of evidence has yet been taken, and I neither affirm nor deny the truth or otherwise of any single one of the facts above stated. Some of them I believe are not disputed, but many are so. I only state the case as it has been placed before us by the Counsel for the appellants. Moreover, it must be remembered that, by express provision of the Code of Procedure (s. 139), the Court may frame the issues from the allegation of facts which it collects from the oral expression of the parties or their pleaders, notwithstanding any difference between any allegation of fact and the allegation of fact contained in the written statement (if any) tendered by the parties or their pleaders. The allegations of fact, set out by us above, as relied on by Mr. Kennedy, do not, however, materially differ from the allegations of fact set out in the plaint, except in this that, whereas in the plaint there were allegations that both the revenue sales were set aside, those allegations are now withdrawn, and it is admitted that they were neither of them set aside (1). As before pointed out, it is clear from the 3rd and 11th issues that something was said upon this point in the Court below, and it is very doubtful whether these allegations were not then withdrawn; for, it is to be observed, that, whilst in the District Judge's statement of the facts of the case in his judgment, no reference is made to either of the sales being set aside, and, whilst the 11th issue raises the question whether the

(1) The sale of McArthur was set aside.

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tenure could be revived *without* the sale of 1837 being set aside, the plaintiffs did not ask for any issue upon the question whether or no that had been done. But if there were any doubt about this, and as to the application of s. 139 when the case is in the Court of Appeal, there are still the provisions of s. 141 under which "at any time before the decision of the case, the Court may amend the issues or frame additional issues on such terms as to it may seem fit, and all such amendments, as may be necessary for the purpose of determining the real question or controversy between the parties, shall be so made." The mode in which the case is now put on the part of the plaintiffs may render necessary the amending of the issues or the framing of additional issues, and this can be done at the request of either party, either by this Court or the Court below, should the case eventually go down for trial.

There is, moreover, in my opinion, ample authority in the decisions of this Court and of the Privy Council, to justify the course which we have taken. In *Joseph* v. *Solano* (1), Sir Richard Couch thus states what he considered the Privy Council to have done in the case of *Mohummed Zahoor Ali Khan* v. *Mussamut Thakooranee Rutta Koer* (2). "The Judicial Committee having held that on the face of the plaint, no relevant case was made against the defendants, but that in a suit properly framed, if he proved his case, he would be entitled to a decree against one, and considering that a new suit would probably be met by a plea of the act of limitations, allowed the appellant to amend his plaint, so as to make it a plaint against that defendant alone for the recovery of money due on a bond. They considered that the liability on the bond might be tried on the issues already settled, but they would not intimate any opinion upon them and the evidence, and remanded the suit for retrial."

In the case of *Joseph* v. *Solano* (1) itself, the plaintiff sued upon a promissory note; the Court of first instance held that one or two small items in the account, forming the consideration for this note were illegal, and on that ground dismissed the suit.

(1) 9 B. L. R, 441, at p. 453. (2) 11 Moore's I. A., 468.

Sir Richard Couch agreed in this opinion, and considered that, with regard to this note, the plaintiffs' suit had failed and ought to be dismissed; but he allowed the plaint to be amended and an issue to be framed, in order to enquire what amount was due to the plaintiff in respect of the consideration of the note. That is going far beyond what we propose to do here.

It is said that the decision of *Eshen Chunder Sing* v. *Shama Churn Bhutto* (1) shows that we ought not to allow the plaintiffs to set up the case upon which they now seek to rely. In my opinion that case has no application whatever to the present. The observations of the Privy Council in that case were based upon the position of this Court when hearing a special appeal, at which stage all consideration of the facts is excluded; and they point out that the learned Judges, whose judgment was under appeal, after all the evidence had been taken and the facts conclusively found, had decided the case upon an assumed state of facts, contrary to those stated in the plaint, and devoid, not only of allegation, but also of evidence in support of it. That is not what is going to be done here. It is true that the Privy Council say they "desire to take advantage of it" (the particular case before them) "for the purpose of pointing out the absolute necessity that the determination in a cause should be founded upon a case either to be found in the pleadings or involved in or consistent with the case they thereby made" (2); and this has been supposed to prohibit all departure whatsoever from the written allegations of the parties. But we must read this decision of the Privy Council with the other decision already referred to, and which was decided only a few months afterwards. The Privy Council must also have been aware that there were no regular pleadings in this country, and they must also have been aware of the provisions of the Code of Procedure to which I have referred, and I have no doubt, therefore, that by the word "pleadings" in this passage was meant such allegations as the parties put forward at the proper time and in the proper manner; and that the practice that the Privy Council wish to enforce, is not an absolutely rigid adherence to the plaint and written statements (which the Code declares not to be necessary), but that care

(1) 11 Moore's I. A., 7. (2) *Id*, 20.

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should be taken to raise properly on the issues and at the proper time the questions to be tried, so as to give the parties an opportunity of producing their evidence and being heard upon the points upon which the decision of the case ultimately turns. I think therefore that there is no objection to the plaintiffs putting their case as they now seek to put it.

It was further objected that no such right to be restored to the tenure as the plaintiffs now put forward could be claimed; in other words, that the case of the plaintiffs as now put did not disclose any cause of action. I do not, however, think that we could dismiss the suit on this ground. Whether any such right, as the plaintiffs now claim, can be established by law, will be determined hereafter when the facts are fully ascertained.

Another objection raised by the respondents, to the mode in which the plaintiffs' case is now put, was, that, if the plaintiffs ever had any such right as that which they now claim, it had been abandoned by the conduct of Sreemunto Lall Khan, particularly by his conduct with reference to the litigation of 1844 in which he was plaintiff. But this I think cannot be determined now. If the suit be tried, this may form one of the issues.

Then, we come to the question, whether the claim of the plaintiffs is on the face of it barred by limitation, and, of course, in determining this point at this stage of the proceedings, we must take the case as the plaintiffs choose to put it, provided that they keep within the allegations made.

Now, from the mode in which the arrangement between the Rajah, the Government, and the Watsons, is stated in the first part of the plaint, I should certainly have thought that any right Sreemunto Khan obtained thereby might have been asserted at once. He could apparently have required the Rajah to recognize his tenure at once. This the Rajah might have done by allowing Sreemunto Khan to stand between himself and the Watsons, in respect of the lands covered by his tenure, which would in no way have interfered with their ijara, and would have put him at once in possession of a large income. To this income, if there be anything in his present case at all, it would appear to me that he was then entitled. Instead

however of asserting this right, Sreemunto Khan chose to join with the Rajah, in trying to get rid of the Watsons altogether, by asserting that he held his tenure *under* the Watsons instead of *over* them, a right which he failed to establish. That however is not the view which the plaintiffs now put forward as to the effect of the transactions between the Rajah, the Watsons, and the Government. They contend that, during the ijara of the Watsons, Sreemunto Khan's rights as mokururedar were entirely suspended, and they go so far as to assert that this point has been finally determined by the decision of the Principal Sudder Ameen. I do not assent to this latter contention. I do not think that this view, which certainly seems to have been in the mind of the Principal Sudder Ameen, was affirmed by the Privy Council. Nor can I help considering it as something extraordinary that the Government should have done this apparent injustice to Sreemunto Khan. I do not see why an arrangement should have been made which benefited the Rajah at his expense when the general desire was to protect the claimants on the zemindari. But I must admit that we are not now in a condition to decide this question; because the documents which show the exact nature of the transaction are not before us; they were apparently filed with the plaint, but were removed from the record by order of the District Judge, and have not been restored, and I cannot therefore undertake to say that the effect of the transaction cannot have been such as the plaintiffs allege and as the Principal Sudder Ameen appears to have thought. I cannot therefore say that the right now set up was capable of being asserted as soon as the Rajah was restored to his zemindari, and that, on this ground, it is barred by limitation.

Again, it is contended for the defendants that, if Sreemunto Khan's interest was suspended during the ijara of the Watsons, it was then in the nature of a remainder or reversion, which fell into possession in 1860, and that the suit was therefore barred within twelve years of that date under the provisions of cl. 141 of sched. 2 of Act IX of 1871. But Mr. Kennedy meets this by the assertion that the right of Sreemunto Khan or his representatives was merely a personal equity as

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against the Rajah, and not anything in the shape of a remainder or a reversionary right to the land itself.

Here, again, without the documents before us, it is impossible to say what was the nature of the plaintiffs' right, and, if the plaintiffs choose to put their case in this way, I do not think we can then apply this provision of the statute. As far as I can see, if the plaintiffs succeed in establishing their case in the way in which they now put it, no question upon the statute of limitation really arises at all. They base their present right upon the last recovery of the estate by the Rajah Ajoodhyaram by the decree of the District Court of Midnapore, affirmed by this Court, and say their cause of action arose when he recovered actual possession of the estate. It is really therefore at the present stage of the inquiry rather a question whether the plaintiffs disclose a cause of action than whether the suit is barred by the statute of limitation. I have already said that I am not prepared to say that the case of the plaintiffs as now put discloses no cause of action. I think sufficient is stated to render it necessary that the suit should be tried.

In this view, it is, of course, unnecessary to express any opinion upon the contention of the plaintiffs that, even if they could have brought their suit, whilst the Rajah was out of possession, they would be protected by the provisions of s. 19 of Act IX of 1871. But as that point has been argued and may possibly arise again, I may say that, in my opinion, s. 19 does not apply to this case, because I do not think the plaintiffs allege that they claim through either Abbott or McArthur by whose fraud they allege that they were kept in ignorance of their rights.

The lower Court seems also to have proposed to deal with the 11th and 12th issues, and what I understand to be the opinion of the lower Court on these issues is that the Privy Council had finally decided on the 3rd February 1854 that the maurasi tenure was destroyed by the revenue sale of 1837, and could not be regained until that sale was set aside by a suit. The Privy Council do undoubtedly say in one passage "all the right of that party (*i.e.*, Sreemunto Khan) was merely to institute a suit for the purpose of setting aside the sale which had

been made to Government, and the lease which had been granted under that sale." But the view of the case now put forward was certainly not then suggested to the Privy Council and was not adjudicated on. The objection, if it is worth anything, falls rather under s. 7 of the Procedure Code than under s. 2, but I do not think it falls under either; for if the view of the transaction between the Government, the Watsons, and the Rajah, which the plaintiffs now contend for, be correct, their present cause of action was not in existence at all at that time.

Lastly, the lower Court held that the plaint ought to be returned upon the ground that it is deficient in the particulars required by s. 26 of Act VIII of 1859. That section requires that "when the claim is for land or for any interest in land, the nature of the tenure or interest must be specified; and if the claim be for land forming part of a village or other known division, or for a house, garden, or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its identification" (cl. 5). Taking this with the form given in cl. 4, it is clear that, when a whole estate bearing a name is sued for, the boundaries need not be given. The plaintiffs here seek to recover two estates "Mouzah Barooah," formerly included in Hudah Tomapara and now included in the map of Hudah Satpatti Jungle Mehal, and "Jungle Mehal, Hudah Satpatti, &c., composed of the turrufs therein comprised, *viz.*, Turruf Roygurh, Turruf Gurwah, Turruf Sabboni, and Turruf Nij Satpatti, and the mouzahs situated within them." This is the correct translation of the plaint given to us.

My learned colleague suggests that the plaintiffs should make their plaint more precise by filing their survey maps of the mouzahs which they claim, and I concur in that view. The plaintiffs therefore will be ordered to do this.

In my opinion, the decree of the lower Court, dismissing the suit, should be set aside, and the suit remanded to the District Judge of Midnapore for trial.

The costs hitherto incurred will abide the result.

MITTER, J.—I am also of the opinion that the judgment of

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the lower Court cannot stand. But I desire to record the grounds upon which I think that, at this stage of the case, the lower Court was not right in dismissing the suit as barred by limitation. Upon the other objections raised before us on behalf of the respondents, I entirely concur in the reasons given by my learned colleague in overruling them.

The plaintiff puts his cause of action as having arisen when the defendants' possession was restored. This is admittedly within the time allowed by the law of limitation for bringing a suit of this nature. At this stage we cannot say that according to the case which has been put before us, the ground upon which the plaintiffs' case has been made to rest does not constitute a valid cause of action. The contention of the learned Counsel for the plaintiff has been that, according to the arrangement under which the zemindari was restored to the defendant, the plaintiff acquired an equitable right which would entitle him to demand possession of his mokururee property from the Rajah, whenever he happened to be in a position to make good that right. It has been further said that this being a personal equity against the Rajah, enforceable against him or persons deriving their title through him with notice of the existence of this equity, it could not be enforced against the Rajah's mortgagees, because they had no notice of this equity, and the time for enforcing it against the Rajah arrived only when his possession over the zemindari was established. Without allowing the plaintiff to adduce his evidence, we cannot say that this case, as put before us, cannot succeed, and must be therefore dismissed at this stage. Again, if the facts upon which the plaintiffs' case as put before us is based be established, it would be a question requiring serious attention whether the plaintiffs' claim would not be saved from the operation of the law of limitation under the provisions of s. 29 of Act I of 1845. But it is not necessary to consider this question now, because, upon the other contention raised by the learned Counsel for the plaintiff, I am not prepared to say at this stage that the cause of action disclosed is not such a valid cause of action that the plaintiffs can successfully maintain this suit upon it.

But it has been said that, upon the statements of the plaintiffs'

case, it is evident that the cause of action for the establishment of the plaintiffs' title accrued at a much earlier date, and counting from it, the present suit has not been brought within the time allowed by the law of limitation. The contention of the learned Counsel for the respondent upon this point is two-fold. First, that immediately on the restoration of the zemindari to the defendant in the year 1842, the plaintiffs' cause of action arose; and secondly, if it did not arise then, at any rate, it arose in the year 1860 when the time of the ijara to Messrs. Watson & Co. expired.

In the year 1842 when the zemindari was restored, it has now been conclusively established that the plaintiffs were not entitled to possession. In a suit instituted by the father of the plaintiffs, against Messrs. Watson & Co., which went up to the Judicial Committee of the Privy Council, it was held that the zemindari was restored to the defendant, preserving intact the rights which Messrs. Watson & Co. acquired under the then existing revenue sale law. But it has been said that the father of the plaintiffs could assert his right immediately by asking the Rajah to recognize his tenure by allowing him to stand between him (the Rajah) and the ijaradars, Messrs. Watson & Co. This he could not do, because the ijara lease extended over the whole of the jungle mehal, while the plaintiffs' tenure comprises only a portion of it. He could only ask the Rajah to account to him for his share of the profits derivable from the ijaradari proportionate to the interest he had in the jungle mehal. But if the Rajah failed to account to him in any particular year for his share of the profits, that gave rise to a cause of action for suing the Rajah to recover his share of the profits, a cause of action very different from the one upon which the present suit has been brought. I do not mean to say that under no circumstances non-payment by the Rajah to the plaintiff's father of his share of the profits could give rise to a cause of action upon which he would be bound to sue within the time allowed by law to enforce the right alleged to have been secured to him by the compromise between Government and the defendant. Facts might be established which would go to show that such a cause

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of action did accrue. But there is nothing in the statement of the plaintiffs' case as it was put before the lower Court or before us, from which we can say that this was the case. Furthermore, it appears to me that it has not been admitted by the plaintiffs that the defendant did not account to them for their share of the profits during the continuance of Watson's ijara lease.

Then as regards the other contention. The learned Counsel for the plaintiffs answers it by asserting that their right is of such a nature that it could not be enforced against the Rajah's mortgagees who had no notice of it. Without an enquiry into the nature of this right, and without an enquiry into the question, whether the mortgagees had or had not such notice, we cannot say that this is not a sufficient answer. Further, as I have already observed before, it is a question which would require serious consideration in this case, whether the provisions of s. 29 of Act I of 1845 would not enure to the benefit of the plaintiffs. Although it has been declared by a competent Court that the revenue sale of the zemindari in 1848 is to be treated as a mere private sale between the defendants on the one hand, and the auction-purchaser and the subsequent transferees on the other hand, it by no means follows that, after the zemindari came back to the defaulting proprietor, the under-tenants would not be entitled to rely upon s. 29 of the sale law of 1845 for being restored to their tenures.

For these reasons I do not think that, at this stage of the case without a trial of it, the plaintiff's case should be dismissed as barred by limitation.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Macpherson and Mr. Justice Morris.

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June 15.

Criminal Proceedings—Irregularities—Effect of Waiver by Prisoner—Disqualifying Interest of Judge—Judge giving Evidence.

The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, *L*, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial on being questioned that they had no objection to the composition of the Bench, but after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government pleader to prosecute, and both the District Magistrate and *L* gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced *L* to sign as correct, and *L* had sanctioned the sale at the rates credited to Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, *L* was deputed by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction,—

Held, that *L* had a distinct and substantial interest which disqualified him from acting as Judge.

Held further, that although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where

* Criminal Motion, No. 800 of 1876, against the order of the Sessions Judge of Midnapore, dated the 11th February 1876.

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he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

Held further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

THE prisoner Bholanath Sen, while occupying the post of jailor of the District Jail at Midnapore, was accused by one of the jail clerks of falsifying his books and defrauding the Government. The matter was enquired into by the District Magistrate, Mr. Harrison, by whose order the prisoner was placed on trial for criminal breach of trust as a public servant before a Bench of Magistrates consisting of Mr. Harrison himself and four Honorary Magistrates. One of the latter was a Mr. Larymore, who, at the time of the commission of the alleged offences, and at the time of the trial, was the Officiating Superintendent of the jail and the prisoner's immediate superior. In his judgment in the case Mr. Harrison stated that the prisoner and his pleaders were asked before the commencement of the trial whether they had any objection to the composition of the Bench, and that they distinctly said they had none whatever. The prisoner's consent however was not formally recorded, and after the charges were drawn up the prisoner's Counsel objected to the Bench as formed. Under instructions from Mr. Harrison, the Government pleader appeared to prosecute, and both Mr. Harrison and Mr. Larymore gave evidence for the prosecution. After the case for the prosecution was closed, two distinct charges against the accused were framed, the first of debiting Government with the price of more oil-seed than he actually purchased, and the second of receiving payment for certain oil at a higher rate than he credited to Government. As regards the first charge the prisoner was alleged to have received money for the oil-seed on the strength of certain vouchers which he had induced Mr. Larymore to countersign as correct, and with respect to the second charge the prisoner's defence was that Mr. Larymore had himself sanctioned the sale at the rate credited to Government. Upon the accused giving the names of the witnesses he intended to

call in his defence, Mr. Larymore was deputed by his brother Magistrates to examine some of them who were connected with the jail and to take down their statements at once in the presence of the agents of both parties in order to prevent any suggestion that the witnesses had been tampered with and "to guard against subsequent deviation." The depositions so taken were placed on the record "for the use of either party, though not themselves as evidence." Separate judgments were written by the various members of the Bench, but all five joined in signing the finding and sentence of the Court convicting the accused on the two charges of criminal breach of trust under s. 409 of the Penal Code, and sentencing him to two periods of rigorous imprisonment amounting in all to two years, and to a fine of Rs. 1,000, and in default of payment of the fine to six months' additional imprisonment.

An appeal by the prisoner to the Sessions Court was dismissed and he now moved the High Court to quash the conviction.

Mr. *M. Ghose* (Baboo *Boidonath Sen* with him) for the prisoner.—The conviction is bad not merely on the ground of the serious irregularities which marked the whole course of the proceedings, but because the Bench of Magistrates, as constituted, was incompetent to try the case. The District Magistrate who presided at the trial was virtually the prosecutor, and Mr. Larymore was materially, in fact pecuniarily, interested in the result of the trial, and therefore disqualified from acting as Judge: *Queen* v. *Meyer* (1), *Queen* v. *Hiralal Das* (2); and the presumed consent of the prisoner would not cure the disqualification—*Queen* v. *Bertrand* (3). Further it was illegal, or at least highly improper, for these gentlemen to be both witnesses for the prosecution and Judges of the prisoner's guilt or innocence. Taylor on Evidence, 5th ed., 1197. The Bench of Magistrates, in deputing Mr. Larymore to take the depositions of the witnesses for the defence, committed a grave irregularity, and one which has materially prejudiced the prisoner in his defence.

(1) 1 Q. B. D., 173. (2) 8 B. L. R., 422.
(3) L. R. 1 P. C., 520.

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The judgment of the Court was delivered by

MACPHERSON, J.—This is an application to the High Court under s. 297 of the Criminal Procedure Code.

The petitioner, Bhola Nath Sen, has been convicted by a Bench of Magistrates at Midnapore on two charges of breach of trust, under s. 409 of the Indian Penal Code. He was sentenced to two periods of imprisonment, amounting, in all, to two years' rigorous imprisonment, with a fine of Rs. 1,000, and in default of payment of the fine six months' additional imprisonment.

We are asked to quash the conviction on the ground of various substantial illegalities and irregularities, most of which are set forth in the petition presented to this Court.

The seventh of the grounds stated in the petition is, that it was illegal and improper that a certain Mr. Larymore should have been one of the Bench of Magistrates who tried this case. It appears to us that this is a good ground of objection, and that, under the circumstances, the presence of Mr. Larymore, who had a substantial interest in the prosecution, vitiated the proceedings, and makes it necessary that the conviction should be quashed.

The prisoner Bholanath Sen was the jailor of the District Jail at Midnapore, of which Mr. Larymore was the Superintendent at the time of the trial and at the time of the commission of the offences for which Bholanath Sen was tried. Bholanath Sen was Mr. Larymore's immediate subordinate in the management of this Jail, and the moneys, the receipt of which was the subject of the first charge, were drawn by him from Government on the strength of certain bills or vouchers which (although in fact incorrect) Mr. Larymore had been induced by the accused to countersign as correct; while as regards the second charge, which was for receiving payment for certain oil at a higher rate than he credited to Government, the defence was (and Mr. Larymore proved it to be true) that Mr. Larymore had himself sanctioned the sale at the rate with which the prisoner credited the Government.

The whole case was, that the prisoner, by deceiving and

imposing upon Mr. Larymore, had fraudulently got the sums of money, the receipt and appropriation of which was charged against him as criminal breach of trust. Mr. Larymore being the Superintendent in charge of this Jail, and being connected in this manner with the sums which the prisoner was alleged to have misappropriated, it is evident that he was most substantially interested in the matter, and that he was by no means free from the possibility of pecuniary responsibility in respect of it. That being so, it was most unfortunate that the District Magistrate should have thought fit to select Mr. Larymore to sit as one of the Judges in the case.

The Magistrate says, that Mr. Larymore was friendly to the prisoner, and that it was with a desire to assist the prisoner that he put Mr. Larymore on the Bench. But the Magistrate really erred if he selected Mr. Larymore because he was supposed to be specially friendly to the prisoner, almost as much as he would have erred had he selected him for the opposite reason. A criminal prosecution is not in the nature of a friendly arbitration. It is a penal proceeding of a very grave and serious kind, in which it is impossible to proceed too strictly according to the rules prescribed by law. Connected as Mr. Larymore was with the prisoner in the very matters which were the subject of the trial, it is impossible that his sitting as one of the Judges could be right. It is one of the oldest and plainest rules of justice and of common sense that no man shall sit as judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England. [See the decision of a Full Bench of this Court in the case of *The Queen* v. *Hiralal Das* (1) and the cases there referred to. See also a very recent case in England—*The Queen* v. *Meyer* (2).]

The District Magistrate says, that Mr. Larymore's interest in the matter was very indirect. In this we cannot agree with him: for it is quite clear, even from the evidence given by Mr. Larymore himself, that he had a most distinct and substantial interest. Under certain circumstances it might have proved a direct pecuniary interest. The District Magistrate

(1) 8 B. L. R., 422. (2) 1 Q. B. D., 173.

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himself says as to the second head of charge,—"there is this to be said in palliation of it, that Mr. Larymore's consent was obtained to the price, while the quantity sold was probably fixed in the accounts with a view to square the monthly statements."

We think that, were it on this ground alone, the conviction ought to be quashed.

But, in addition to this, there are several other very serious irregularities to which our attention has been called.

The Bench of Magistrates consisted of the District Magistrate, Mr. Harrison, Mr. Larymore, the Officiating Superintendent of the Jail, Dr. Bachelor and two native gentlemen, being a Bench of five. In the course of the trial, both Mr. Harrison and Mr. Larymore were examined as witnesses for the prosecution. Without saying that it is illegal for a Magistrate to give evidence in the witness-box in a case with which he is dealing judicially, it clearly is, on general principles, most undesirable that a Judge should be examined as a witness in a case which he himself is trying, if such a contingency can possibly be avoided. (See the Full Bench case—The *Queen* v. *Hiralal Das* (1)—already referred to.) The mere fact that Mr. Harrison and Mr. Larymore were necessary witnesses for the prosecution was a most cogent reason why neither of them should have been members of the Bench by which the prisoner was to be tried. Mr. Harrison was almost as much out of place on the Bench as was Mr. Larymore. For the whole alleged fraud was discovered by Mr. Harrison himself: the prosecution was initiated, and the Government pleader was instructed by him: and he was one of the most important witnesses for the prosecution. That being the District Magistrate's position, we cannot conceive why he did not place the case (which is really a very important one) before some Magistrate in no way connected with it, who might have disposed of it himself, or might have committed the accused for trial to the Sessions, instead of going out of his way to have the case tried by a Special Bench composed of Magistrates, of whom two were manifestly objectionable.

(1) 8 B. L. R., 422.

In making these remarks, we do not say that a Magistrate is incapacitated from dealing with a case judicially, merely because in his character of Magistrate it may have been his duty to initiate the proceedings. We only say that it was wrong that the District Magistrate should deal with a case judicially when there was no sort of necessity for his doing so, when he had himself discovered the alleged fraud and initiated the prosecution, and when he was one of the principal witnesses against the prisoner.

Then, again, we find that after the case for the prosecution was closed and formal charges were drawn up, and the accused had given the names of the witnesses whom he intended to call, Mr. Larymore was deputed by his brother Magistrates to go and take the depositions of some of these witnesses, Mr. Harrison in his judgment says:—"When the witnesses for the defence were named, most of them were connected with the jail. As it would certainly be said by whatever party they gave evidence against, that they had been tampered with, the Court suggested, and both sides agreed, that these statements had better be taken down at once in the presence of the agents of both parties and of one of the Honorary Magistrates, to guard against "subsequent deviation. Accordingly, they were questioned, and their answers recorded in this way on the 12th and 13th November, and the statements are placed with the record for the use of either party, though not themselves as evidence." We are unable to understand what such a proceeding is supposed to mean. Here is a man being tried on a very serious charge, who names the witnesses whom he means to call. Thereupon "the Court" suggests that "to guard against subsequent deviation," the statements of these witnesses should be taken down at once in the presence of one of the Honorary Magistrates and of the prisoner's agent. Accordingly, the statements are taken down by Mr. Larymore, and the depositions so recorded "are placed with the record for the use of either party, though not themselves as evidence." This was a most irregular and unfair proceeding. The Court had no possible right to receive from Mr. Larymore or from any body else statements recorded after such a fashion; or to place

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these statements with the record, if they were not themselves evidence. As a matter of fact, those statements were taken down and were placed with the record, for the sole purpose of being used against the prisoner. And they are practically so used by the Magistrate, Mr. Harrison, who, in his judgment, says:—"Now, Uma Churn Chatterjee's evidence I have already said I consider quite unworthy of credit, and it will be observed that when his statement was taken before Mr. Larymore on November 13th, he was never questioned about these purchases or said anything about them."

In our opinion, the deputing Mr. Larymore to take in an irregular way the statements of the witnesses whom the prisoner meant afterwards to call in support of his defence, was most unfortunate. It was quite illegal and unjustifiable. The District Magistrate, Mr. Harrison, in his judgment, says, that when the Court suggested, "that these persons should be examined at once in the presence of one of the Honorary Magistrates," both sides agreed "that this had better be done. And doubtless he relies on that agreement," as justifying and sanctioning what was done. So, as regards the objection taken to Mr. Larymore's being on the Bench and to Mr. Harrison's own presence there, he relies on the consent given by the prisoner in the first instance.

The District Magistrate has throughout these proceedings treated them very much as if they had been proceedings pending in a civil suit, and has lost sight of the wide difference which exists between a civil suit and a criminal prosecution. Criminal proceedings are bad, unless they are conducted in the manner prescribed by law; and if they are substantially bad in themselves, the defect will not be cured by any waiver or consent of the prisoner. When the irregularities are all unfavorable to the prisoner, as in our opinion they clearly were in the present case, it is impossible for any Court to consider a waiver or consent as binding on him. It is the duty of Magistrates and all Criminal Courts to follow the procedure prescribed by law, and there is no law which sanctions their intentional departure from that procedure; and then attempting to protect themselves against the consequences of such departure

by getting the accused person to say he consents to it. In the mofussil, most prisoners, not properly defended, would probably assent to any irregularity which the Judge or Magistrate trying him chose to suggest. There would be an end to all procedure, if such an assent were held to warrant material and important irregularities.

But after all what really was the nature of the consent given by the prisoner as to the composition of the Bench? After the witnesses for the prosecution had been examined, formal charges were, on the 10th of November, drawn up, and the plea of "not guilty" was recorded. The accused gave the names of his witnesses, and the further hearing was adjourned to the 4th of December. In his judgment, Mr. Harrison, says:—"After the charge was drawn up, and the case resumed after the long adjournment for the defence, the accused's Counsel objected to the composition of the Bench, both to Mr. Larymore's presence on it and to mine. Except under the special circumstances of the case Mr. Larymore's presence on the Bench might obviously be questionable, and hence before commencing the trial the accused and his pleaders were expressly asked, if they had any objection to the composition of the Bench, when they distinctly stated that they had none whatever, &c."

It is to be noted that the objection was raised and pressed, before the case had proceeded further than the point of drawing up formal charges and recording the plea of "not guilty;" also that before that time both Mr. Harrison and Mr. Larymore had given evidence as witnesses on behalf of the prosecution. But it is not stated, and there is nothing to lead us to suppose, that when the prisoner was asked whether he objected to the composition of the Bench, he was warned that Mr. Harrison and Mr. Larymore were both very important witnesses for the prosecution. The record of the case does not show that, when the prisoner was first brought before this Bench, he was asked whether he objected to its composition; except that Mr. Larymore deposes to the fact which is confirmed by Mr. Harrison in his judgment. It is a matter of comparatively little consequence whether it is recorded or not. But if the Magistrates really intended to rely

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on the prisoner's consent, that consent ought to have been formally and accurately recorded at the time it was given.

On these grounds, and without entering into the other objections which the prisoner's Counsel take to the conviction, we think it clear that there have been most serious and material errors in the proceeding in this case, which have been greatly to the prejudice of the prisoner. We, therefore, set aside the conviction and sentence, and order that the prisoner be discharged and that the fines, if paid, be refunded to him.

The Magistrate of the District, no doubt, had authority to direct that this case should be tried by a Bench of Magistrates. But a complicated and somewhat difficult case like this is by no means one which it is desirable to place before such a Court. And the result shows that this is so. The case is one in which the strictest accuracy is necessary:—whereas the proceedings have been diffuse and loose in the highest degree. Moreover, there is not one "judgment" by the Court, but a series of judgments, which to say the least of it is most inconvenient. Mr. Harrison writes the judgment (a most voluminous one) on the first charge, and says that he concurs with Mr. Larymore's judgment on the second charge. Mr. Larymore writes a judgment on the second charge, and says he concurs in Mr. Harrison's judgment on the first charge. Dr. Bachelor writes that he concurs in the judgments of Mr. Harrison and Mr. Larymore. And the two native Magistrates write a long judgment of their own. All the five Magistrates however so join in signing in a regular way the final "finding and sentence" of the Court. The case comes before us under somewhat peculiar circumstances; for the prisoner availed himself (as to a portion of his case at least) of his right of appeal to the Sessions Judge. The appeal was unsuccessful, although he, in his petition, repeated his objections to the constitution of the Court which tried him. Notwithstanding that the appeal was dismissed, it appears to us that the irregularities on which we have dwelt are so serious and so important as to render it imperative on us even now to quash the whole proceedings.

Conviction quashed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

MACGILLIVRAY *v.* THE JOKAI ASSAM TEA COMPANY.

1876 *Sept.* 5, 6, & 14.

Master and Servant—Suit for damages for wrongful dismissal—Incompetence —Rendering free and just accounts—Warranty.

The plaintiff, having obtained recommendations as a tea assistant in the defendant company's garden in Assam, came out to Calcutta, and, after some interviews with the defendants' agents there, entered into an agreement with the defendants to enter into their service as assistant in their tea gardens for a period of three years. The agreement stipulated that the plaintiff should, "when required to do so, render just and true accounts, and give every other particular and information of all moneys, &c., entrusted to him, or that may come into his possession, power, or custody or under his control;" and it was also agreed that the defendants should "be at liberty to annul this agreement at any time for wilful misconduct of the plaintiff in not fulfilling the terms and conditions to be observed by him, or if he shall be prevented by reason of continued illness from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the defendant company," and in those cases the salary was to cease, and the plaintiff be discharged from the defendant company's service. The plaintiff proceeded to Assam, worked for a short period in the defendants' garden, and was then dismissed from the company's service, on the ground of his incompetence. In an action brought for damages for wrongful dismissal, the Judge of the Small Cause Court was of opinion that, under the circumstances, there was no implied warranty in the part of the plaintiff of his competence, and the grounds for dismissal having been expressly stated in the agreement, the defendants were not justified in dismissing him on another ground, and therefore should not be allowed to give evidence of his incompetence. *Held*, on reference to the High Court, that the plaintiff, having expressly undertaken to render true and just accounts, his incompetence to do so would, if proved, be an answer to the action, and therefore the defendants ought to have been allowed to give evidence that he was incompetent. "True and just accounts" meant such accounts as an inexperienced assistant in a tea garden might reasonably be asked to render, and were not to be interpreted merely as an undertaking that the plaintiff would act honestly by his employers. *Held* also, that the agreement expressly stating the grounds of dismissal did not preclude the defendants from dismissing the plaintiff for incompetence.

CASE referred for the opinion of the High Court, under s. 7 of Act XXVI of 1864, by H. Millett, first Judge of the Calcutta Court of Small Causes.

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"This suit is brought by the plaintiff, to recover Rs. 1,000, after abandoning all excess, as damages for wrongful dismissal and breach of contract. The defendant company pleaded that they had dismissed the plaintiff for incompetence, and, when the case was called on on the 24th June 1876, Mr. Macrae, the Counsel for the defendants, applied for a commission to examine Dr. O'Brien, the manager of the garden in Assam, and also Dr. White, one of the largest shareholders in the company, who resides near the garden, in order to prove the incompetence. This application was opposed by the other side, on the ground that such evidence would not be material, as the plea of incompetence could be no defence to the suit, and this in fact is the real question to be decided.

"All the facts, except as regards the incompetence, are practically admitted, and are as follows:—Messrs. Balmer, Lawrie & Co., who are the agents of the defendant company (and who for the purposes of this reference may be considered as the defendants), received a letter from Mooltan, dated 26th July 1875, from a Mr. MacBean, who seems to be in some way connected with the Punjab Bank, as follows:—

GENTLEMEN,

I am anxious to get a young relative of mine on to a Tea Estate, and it has just occurred to me that, from your connections with tea gardens, you may sometimes have enquiries from the gardens for assistants. The lad I speak for is about 24 years of age, and from the life he has been brought up to is just the sort of person who would make a first-class assistant. His father is a farmer in a place called Strathnairn in the highlands of Scotland, and he has been brought up to assist on the farm. He is a strong able young man, and steadiness itself. He is quite ignorant of town life which should be all in his favor, and another point which should recommend him to you, *viz.*, that he is of a very amiable disposition and well-suited to manage the natives. If I can get a promise of a berth as assistant in a tea garden for the lad, I would send for him at once.

"The young man alluded to in this letter was the plaintiff, and he accordingly came to Calcutta, and, on the 12th January 1876, the parties executed the following agreement."

The case referred then set out the agreement by which the

plaintiff was engaged as an assistant in the defendants' tea gardens for a period of three years. The following are the only clauses material to this report:—

"And further that, during the time of such service as aforesaid, he will, whenever required to do so, render just and true accounts, and give every other particular and information of all moneys, goods, and chattels, merchandize, and other products and things entrusted to him, or that may come into his possession, power, or custody, or under his control. .....And, lastly, it is agreed that the said company, or the directors and agents thereof, shall be at liberty to annul this agreement at any time for wilful misconduct of the said Duncan MacGillivray in not fulfilling the terms and conditions on his part to be observed, or if the said Duncan MacGillivray shall, by reason of continued illness be prevented from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the said Jokai Tea Company, Limited. And thereupon the salary specified herein shall completely cease, and the said Duncan MacGillivray be discharged from the company's service."

The reference then continued :—

"The plaintiff subsequently went up to Assam, worked for a short period, and was dismissed finally by a letter from Messrs. Orr and Harris, the defendants' attorneys, dated the 5th April 1876.

"It was alleged that the plaintiff was clearly incompetent in so far as he was unable to write an ordinary business letter, and so far a letter of the plaintiff's shows that he is unable to write any better English than an ordinary out-door servant in England would be able to write; but, at the time of making the application, no suggestion was made that he was unable to render accounts.

"It was contended, therefore, on the authority of *Harmer* v. *Cornelius* (1), that there is always an implied representation on the part of the person taking service, that he is capable of performing the service required of him, and that the failure to afford the requisite skill so impliedly promised is a breach of legal duty, and therefore misconduct and even wilful misconduct. There is no doubt on that authority that when a skilled laborer, artizan, or artist is employed, there is an implied warranty on

(1) 5 C. B., N. S., 236.

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his part that he is of skill reasonably competent to the task he undertakes; but in the judgment, Willes, J., says:—'It may be that, if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man who is known to have never done anything but sweep a crossing, to clean or mend his watch, the employer would probably be held to have incurred all risks himself.' The case of the crossing-sweeper is, no doubt, an extreme case, but it means to say that there may be cases of service where there is no implied warranty on the part of the servant that he is competent to perform the duties he undertakes.

"Here the defendants employ a young man from the highlands of Scotland, whose recommendations seem to be that he is strong, able and steady, quite ignorant of town life and amiable in his disposition, and they employ him for duties concerning which he could have had only vague ideas, and in a country entirely strange to him. It may fairly be said that, if they employ a simple country youth with no better recommendations than the above, they do so at their peril, for it is not alleged as against him that there was any express representation of competency.

"But apart from this, the parties have gone out of their way to insert in their agreement the ground on which the defendants are at liberty to annul it, and those are wilful misconduct, continued illness preventing him from attending to his duties and the insolvency of the company. Looking at the position of the parties, there seems every reason that such a clause should be inserted;—nothing could be more inconvenient than for a man who had come thousands of miles to obtain a particular employment, to be discharged from such employment when obtained for any reason beyond those stated in the agreement. Looking at the fact that the defendants might, with ordinary ease, have decided the question of his incompetency before they signed the agreement, *Dickson* v. *Zizinia* (1) seems to apply here—Maule, J., saying:—'We should not by inference insert in a

(1) 10 C. B., 602.

contract implied provisions with respect to a subject which the contract has expressly provided for. If a man sell a horse and warrant it to be sound, the vendor knowing at the time that the purchaser wants it for the purpose of carrying a lady, and the horse, though sound, proves to be unfit for that particular purpose, that would be no breach of warranty. So, with respect to any other kind of warranty, the maxim *expressum facit cessare tacitum* applies to such cases. If this were not so, it would be necessary for the parties to every agreement to provide in terms that they are to be understood not to be bound by anything which is not expressly set down which would be manifestly inconvenient.'

"For the above reasons I was of opinion that the commission was unnecessary; and as it was stated on the part of the defendants that there was no other defence, and that the damages asked for could not be considered excessive, the case was practically undefended, and, after examining the plaintiff, judgment was given for him for the full amount sued for.

"But at the request of the Counsel for the defendant, I refer the following question for the opinion of the High Court :—'Whether the plea that the plaintiff was dismissed for incompetence is a good defence to this suit.'

"Contingent on the opinion of the High Court, my judgment is for the plaintiff for the full amount sued for."

Mr. *Macrae*, for the defendant, at whose request the reference had been made, commenced, and contended that the defendants ought to have been allowed to go into evidence of the plaintiff's incompetence, which would be an answer to the suit. Under the express terms of the agreement, he was bound to be competent to render just and true accounts, meaning thereby that he should be able to give to his employers in Calcutta such ordinary accounts as would be necessary for an assistant in a tea garden to keep and send in a written form to his employers. We don't contend he must be a skilled book-keeper. This the defendants have evidence to show he was incompetent to perform, and they were entitled therefore to dismiss him. The learned Counsel refered to the case of *Harmer* v. *Cornelius* (1) to show

(1) 5 C. B., N. S., 236.

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that there is in such an agreement an implied representation of competency.

Mr. *Shiell*, for the plaintiff, contended, that the grounds of dismissal stated in the agreement were the only grounds which would justify the plaintiff's being dismissed. If it had been intended that he should be liable to dismissal on other grounds, they would have been stated: not having been stated, they could not, on the principle of the maxims *expressio unius exclusio alterius* and *expressum facit cessare tacitum*, be now implied; see Broom's Legal Maxims, 651, 5th ed., and *Aspdin* v. *Austin* (1).

The clause relating to the "true and just accounts" did not mean that the plaintiff was to be able to keep written accounts, or understand accounts at all, but refers to his honesty in everything that should be entrusted to him. [MACPHERSON, J.—We must treat this as if it were an argument on demurrer and assume he was incompetent, as no evidence was allowed to be called.] Even if he were unable to satisfy that clause of the agreement in the strict sense contended for by the defendants, that would not go to the root of the agreement so as to avoid it: he would not thereby become liable to be dismissed. The clause as to rendering accounts is restricted by that stating the grounds of dismissal in which the parties have specified what should be good cause, and which cannot be extended by implication; see *per* Denman, C.J., in *Aspdin* v. *Austin* (2). It is said competence must be implied in a case of this kind, but wilful misconduct would of itself have been a ground for dismissal, yet that is specified in the agreement, as would incompetence have been expressed if it had been intended to be a ground of dismissal. In *Harmer* v. *Cornelius* (3) there were no specified grounds of dismissal. The services contracted for in that case moreover were skilled services, and in case of skilled persons competence for the work in which they profess to be skilled is implied. Here there was nothing

(1) 5 Q. B., 671. (2) *Id.*, at p. 684.
(3) 5 C. B., N. S., 236.

of that kind; the defendants knew the plaintiff could know nothing about a tea garden, and they did not engage him until they had seen him and had an opportunity of judging of his capabilities—thus they took the risk on themselves as put by Willes, J., in *Harmer* v. *Cornelius* (1). [MACPHERSON, J.—Willes, J., says, that failure to perform what has been promised is misconduct, which would justify a servant's dismissal.] The principle which governs cases in which skilled services are guaranteed do not apply to the present case. It is submitted that the principle of *caveat emptor*, which applies in ordinary cases of sale of goods, has some bearing on this case. [GARTH, C.J.—Here there is an express warranty as to fitness to render accounts.] Where parties have purchased with their eyes open they take the risk. There is no implied warranty on the part of the vendor. From that view fitness would not be implied at all; it is a case similar to the defendants having purchased goods after inspection.

Mr. *Macrae* in reply.—We take rendering accounts in the common and ordinary meaning of that term. If we are driven to a strict interpretation of the contract, *Harmer* v. *Cornelius* (1) is an authority for saying that if a servant is unable to perform work he has undertaken to do, it is misconduct, and would justify his dismissal; it does not matter whether he cannot, or will not, do it. If this is taken as an argument on demurrer, and the plaintiff treated as incompetent, as must be done, how would he allege his readiness and willingness.

Cur adv. vult.

The opinion of the High Court was as follows:—

GARTH, C.J.—We are of opinion that, with reference to the express terms of the written agreement entered into on the 12th of January 1876, the plaintiff distinctly undertook that he would, "whenever required to do so, render just and true accounts, and give every other particular and information of all moneys, goods, and chattels, merchandize, and other products and things entrusted to him, or that might come into his possession, power, or custody, or under his control;" and we think

(1) 5 C. B., N. S., 236, see p. 246.

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that the defendant company ought to have been allowed to go into evidence to show that the plaintiff was not reasonably competent to the task which he undertook. In deciding thus, we act in accordance with the principle laid down in the case of *Harmer* v. *Cornelius* (1). The passage as to the crossing-sweeper, quoted by the Judge of the Small Cause Court from the judgment of Willes, J., has no application to the present case. The crossing-sweeper is stated to have been known to his employers as a person who had never done anything but sweep a crossing, and, under such circumstances, must necessarily have been known to be incompetent for the task which he undertook, and, moreover, he is not supposed to have made any express contract with his employers; whereas, in the present instance, there would appear to have been no knowledge by the defendants of the plaintiff's lack of competency, and there was an express undertaking on his part that he would render just and true accounts, &c.

It has been contended by Mr. Shiell that this undertaking does not refer to any rendering of accounts in the sense of keeping what are technically called "books;" or, in other words, that it was merely an undertaking that the plaintiff would act honestly by his employers; but we do not think that this is the true meaning of the agreement. We consider that the plaintiff undertook that, in the event of moneys, &c., coming under his control, he would duly account for them, and furnish all such reasonable information and particulars as might be expected from a person in his position. We by no means construe it as an undertaking that the plaintiff was a skilled accountant in the wider sense of the expression, but we think that he undertook to keep and render such accounts as an inexperienced assistant in a tea garden might reasonably be asked to keep and render.

We further think that the learned Judge of the Small Cause Court is wrong in holding that the last clause of the agreement means that the plaintiff shall in no case be dismissed, except for such wilful misconduct as is there described, or by reason of continued illness, or the dissolution of the defendant company, &c. The agreement does not say that the defendant company shall

(1) 5 C. B., N. S., 236; S. C., 28 L. J. C. P., 85.

not have the right to dismiss the plaintiff for any other cause than those specified. It merely reminds the plaintiff that he may be dismissed for the misconduct which is there specified; but it in no way affects or alters the right which the defendant company had to dismiss the plaintiff for absolute inability to perform what he had undertaken.

The Judge of the Small Cause Court must, therefore, proceed to deal with the case on the merits. Each party will pay his own costs of this reference.

Attorneys for the plaintiff: Messrs. *Chauntrell, Knowles,* and *Roberts.*

Attorneys for the defendants: Messrs. *Orr* and *Harris.*

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Birch.

DEEN DOYAL LALL (PLAINTIFF) *v.* HET NARAIN SINGH AND OTHERS (DEFENDANTS).*

1876
March 20.

Mortgage Bond—Interest after due date, Rate of.

In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

The principle laid down in *Cook* v. *Fowler* (1) followed.

SUIT on a mortgage bond, dated the 28th of Assin 1269 (Fuslee), corresponding with the 17th October 1861, for payment of the principal sum of Rs. 2,600 and Rs. 5,488-8-6 interest, computed at the rate of 18 per cent. per annum, as specified in the bond, from date of the execution of the bond to the 28th Bysack 1281, corresponding to the 29th April 1874.

The original mortgagors were called as witnesses for the plaintiff, and admitted the execution of the bond and the non-

* Regular Appeal, No. 38 of 1875, against a decree of the Subordinate Judge of Zilla Gya, dated the 19th of September 1874.

(1) L. R., 7 H. L., 27.

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payment of principal and interest due thereon. It was however objected on behalf of the subsequent purchasers of part of the mortgaged property, parties to the suit, that the claim as to interest payable after due date was barred on the ground that such interest was not a charge upon the hypothecated property, but partook more of the nature of damages, and should therefore have been sued for within six years of the date when the bond fell due.

The Court below gave the plaintiff a decree for Rs. 2,875-9-6, refusing to award any interest from the date on which the bond fell due.

The plaintiff appealed to the High Court.

Mr. *C. Gregory* and Baboo *Nil Madhub Sen* for the appellant.

Baboos *Mohesh Chunder Chowdhry* and *Jogesh Chunder Dey* for respondents.

The judgment of the Court was delivered by

KEMP, J.—The plaintiff is the appellant in this case. He sued three sets of defendants to recover a sum of Rs. 8,088-8-6, due under a bond dated the 28th of Assin 1269 Fuslee, corresponding with the 17th of October 1861. The principal amount borrowed was Rs. 2,600, and interest is claimed from the 28th Assin 1269, the date of the bond, to the 28th Bysack 1281, date of suit, being twelve years and seven months, at the rate of Re. 1-8 per mensem. The total amount of interest claimed being Rs. 5,488-8-6. The bond was admitted by the principal defendants, the judgment-debtors. They were examined, and they also stated that, after the bond fell due, they were unable to pay it, and that they agreed to go off paying interest. The first defendants, are the purchasers of a portion of the property which was mortgaged to the plaintiff as security for the sum advanced by him to the principal defendants. The Subordinate Judge has given the plaintiff a modified decree for a sum of Rs. 2,875-9-6

out of Rs. 8,088-8-6 claimed. He has also made the plaintiff pay the costs of the defendants, and the result of the suit is, that although the bond is admitted, and the defendants depose that they were unable to pay, and asked for time, and promised to pay interest, they have to pay only about one-third of the amount claimed, and that the plaintiff has only to receive Rs. 2-5 in the shape of costs from the defendants. No wonder that, under these circumstances, the respondents did not appeal to this Court.

The Subordinate Judge has found that, as there is no stipulation in the bond regarding payment of interest after the appointed period for the discharge of the debt, the plaintiff is not entitled to interest after the lapse of that period. . . . . The first objection taken before us by the appellant is, that the Court was wrong in not using its discretion, in overlooking the evidence of the debtor-defendants, and in not awarding interest from the date upon which the bond fell due up to the date of suit. The purchaser-defendants raised the following objection, that interest after the due date is not a charge upon the property hypothecated, inasmuch as any interest after that date is in the nature of damages, and more than six years having elapsed from the date on which the principal fell due, namely, in May 1862, the suit is barred.

We think that the Subordinate Judge is clearly wrong in not awarding interest at all from the date on which the bond fell due. The execution of the bond is admitted, and the bond-debtors admit in their evidence that they were unable to pay the debt on the date it fell due, and that they promised to pay interest from time to time. There is a case before the House of Lords, of *Cook* v. *Fowler* (1), in which it has been held that there is no rule of law that upon a contract for the payment of money on a day certain with interest at a fixed rate down to that day a further contract for the continuance of the same rate of interest is to be implied. . . . Lord Selborne, in his judgment, which is to be found at page 37, says:—" Although in cases of this class, interest for the delay of payment *post diem*,

(1) L. R., 7 H. L., 27.

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ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract. The rate of interest to which the parties have agreed during the term of their contract may well be adopted, in an ordinary case of this kind, by a Court or jury, as the proper measure of damages for the subsequent delay; but that is because ordinarily a reasonable and usual rate of interest, which it may be presumed would have been the same whatever might be the duration of the loan, has been agreed to. But in the case before your Lordships, the agreed rate of interest is excessive and extraordinary; and although no question is raised between the present parties as to its fairness and reasonableness so far as it was matter of express contract, it by no means follows that it would have been fair and reasonable, or would have been so regarded by the borrower, if it had been indefinitely extended to every possible delay of payment after the stipulated time."

Now, applying the principle thus laid down to the present case, we do not think we should be justified in giving the plaintiff interest from the date on which the bond fell due at the rate of 18 per cent. per annum, the rate mentioned in the bond; but we think that, acting upon the discretion vested in us, we ought to allow the plaintiff interest at the rate of 6 per cent. per annum, which is the rate usually allowed by this Court, from the date on which the bond fell due. The plaintiff will therefore be entitled to recover Rs. 2,600 principal with interest at the rate of 18 per cent. per annum up to the date on which the bond fell due, and from that date at the rate of 6 per cent. per annum up to date of payment.

We also think that the decision of the Court below with reference to costs must be modified. We therefore modify the decree of the Court below with reference to our remarks made above as to the interest payable to the plaintiff and the period for which that interest is to be paid, and as regards costs, we think that the plaintiff is entitled to his costs in this Court and in the Court below upon the sum now decreed as against both sets of defendants.

Decree modified.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

TREEPOORASOONDERY DOSSEE *v.* DEBENDRONATH TAGORE.

1876 *June* 13, *and July* 7.

Limitation Act (IX of 1871*), cls.* 122 *&* 145—*Will—Residuary Estate of Moveable and Immoveable Property — Express Trustee — Account—Multifariousness—Jurisdiction—Certificate under Act XX of* 1841—*Act XXVII of* 1860, *s.* 2—*Suit by Hindu Widow without Certificate—Claims to Immoveable Property against Executors and Trustees.*

Held, that cl. 122 of Act IX of 1871 applies to a suit for a share of the residue of a testator's moveable property disposed of by his will.

Prior v. *Horniblow* (1) followed.

Held also, that if a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them.

THE facts and arguments in this case are fully stated in the judgment of the Court.

Mr. *Evans* and Mr. *Bonnerjee* for the plaintiff.

Mr. *Kennedy* and Mr. *Ingram* for the defendant Gunendronath Tagore.

The *Advocate-General*, offg. (Mr. *Paul*) and Mr. *Woodroffe* for the defendant Debendronath Tagore.

Mr. *Macrae* for the executors of the defendant Ganendronath Tagore.

Mr. *Branson* and Mr. *Palit* for the sons of Debendronath, except Suttendronath.

Mr. *Stokoe* for the trustee defendants.

The following authorities and cases were referred to: As to the

(1) 2 Y. & C. Ex., 200.

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suit being a supplementary suit: Seton on Decrees, 1175, 1176, 3rd edition. As to the raising of issues, amending the plaint, and the nature and form of relief: *Arbuthnot* v. *Betts* (1), *Joseph* v. *Solano* (2), and *Hiralal Mullick* v. *Matilal Mullick* (3). As to jurisdiction: *Delhi and London Bank* v. *Wordie* (4), *Juggodumba Dossee* v. *Puddomoney Dossee* (5), *Bagram* v. *Moses* (6), *Whittaker* v. *Forbes* (7), and the cases of construction of wills in *Tagore* v. *Tagore* (8), *Kumara Asima Krishna Deb* v. *Kumara Kumara Krishna Deb* (9), and *Krishnaramani Dasi* v. *Ananda Krishna Bose* (10). As to multifariousness: *Pointon* v. *Pointon* (11) and *Coates* v. *Legard* (12). As to limitation: Daniell's Ch. Pr., 554, and cases there cited—*Berrington* v. *Evans* (13) and *O'Kelly* v. *Bodkin* (14), Act IX of 1871, Sch. II, cls. 122 and 145, *Cholmondeley* v. *Clinton* (15), Story's Equity Jurisprudence, Vol. II, s. 1520, *Clegg* v. *Edmondson* (16). As to the position and powers of an executor: *Sharo Bibee* v. *Buldeo Doss* (17), *S. M. Joykali Debi* v. *Shibnath Chatterjee* (18), *Anund Chunder Ghose* v. *Soorjee Money Dossee* (19), *S. M. Dossee* v. *Tarachurn Coondoo Chowdry* (20), *Nilkant Chatterjee* v. *Peari Mohan Das* (21), *Dhunraj* v. *Broughton* (22), and *In the goods of Tarachand Coondoo Chowdry* (23). As to adoption: *Debee Dyal* v. *Hur Hor Singh* (24), Shamachurn's Vyavastha Darpana, 779, Rattigan on Adoption, 35, *Mussamut Taramunee Dibia* v. *Dev Narayun Rai* (25), Norton's L. C., Vol. I, p. 88, Cowell's Hindu Law, 303, and *Tarini Charan Chowdhry* v. *Ananda Chandra Chowdry* (26).

(1) 6 B. L. R., 273.
(2) 9 *Id.*, 441.
(3) 5 *Id.*, 682.
(4) I. L. R., 1 Calc., 249.
(5) 15 B. L. R., 318.
(6) 1 Hyde, 284.
(7) 1 C. P. D., 51.
(8) 4 B. L. R., O. C., 103.
(9) 2 *Id.*, O. C., 11.
(10) 4 *Id.*, O. C., 231.
(11) L. R., 12 Eq., 547.
(12) L. R., 19 Eq., 56.
(13) 1 Y. & C. Ex., 434.
(14) 2 Ir. Eq. Rep., 361.
(15) 2 Jac. & Wal., 1, at p. 139.
(16) 3 Jur., N. S., 299, at p. 303.
(17) 1 B. L. R., O. C., 24.
(18) 2 *Id.*, O. C., 1.
(19) Morton's Rep., 77.
(20) Bourke, Pt. VII., 48.
(21) 3 B. L. R., O. C., 7.
(22) 15 B. L. R., 296.
(23) Bourke, Pt. V., 1.
(24) 4 Sel. Rep., 320.
(25) 3 *Id.*, 387.
(26) 3 B. L. R., A. C., 145.

PONTIFEX, J.—This case, which has been argued in the settlement of issues, raises many troublesome and difficult questions.

Dwarkanath Tagore, who died about the year 1846, left three sons,—Debendronath, who is still living and is the principal defendant in this suit; Greendronath, who died in 1854, leaving two sons, Ganendronath, who died in 1869, and Gunendronath, who is a defendant in this suit; and Nogendronath, who died in 1858, without issue, leaving a widow, who is the plaintiff in this suit. Dwarkanath Tagore, by his will made in 1843, appointed a Mr. Gordon and his three sons his executors (all of whom, except Nogendro, proved the will), and, after thereby confirming a certain deed of settlement of the 20th of August 1840, making certain devises and bequests (including a devise of a piece of land and a bequest of Rs. 20,000, for the purpose of building a house thereon, to his son Nogendronath), the testator Dwarkanath gave the beneficial interest in the residue of his real and personal estate in effect, and according, as I am informed, to the construction placed on such residuary devise by the Supreme Court in 1847, to his three sons absolutely, as tenants in common. I shall state later on my reasons for considering that the executors of Dwarkanath's will took thereunder the whole of his residuary estate as trustees.

By the settlement of the 20th of August 1840, referred to in his will, Dwarkanath conveyed very valuable immoveable estate, the whole of it outside the jurisdiction of this Court, to trustees, who, under a subsequent appointment, are now represented by the defendants Sarodaprosad Gangooly, Nilcomul Mookerjea, and Nobin Chandra Mookerjea, whom I shall call the settlement trustees. The trusts of the settlement were, that the trustees should, after the decease of the testator Dwarkanath, pay the rents of the lands between his three sons, in equal shares, during their lives, and immediately after the decease of any of them, upon trust, to pay the share of the son so dying to his children, being a son or sons, in equal shares; and the deed provided that, if the sons of Dwarkanath, or any of them, or any of their respective sons, should die without having male issue, and without having duly adopted a son, but leaving a

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widow, then the trustees should pay, out of the rents of the settled property, a sufficient sum for the suitable support of such widow during her life, and for providing her with a suitable residence.

The three sons of Dwarkanath, after his decease, and during their joint lives, received the income of the settled property in equal shares, and after Greendronath's decease, in 1854, it seems to have been assumed by all parties that his two sons, Ganendronath and Gunendronath, were entitled to Greendronath's one-third share, under the deed of settlement.

Nogendro, who died in 1858 without issue, left a will; and a certificate under Act XX of 1841 to collect debts was granted by the Court at Alipore to his nephew Ganendro. The will has been admitted in this suit, by the plaintiff, to be a valid will. The scheme of it is as follows:—The testator, Nogendro, gave authority to his widow, the plaintiff, to adopt a son of Ganendro, or a son of Gunendro, and, in default of a fit son of either, then such child as Ganendro should approve. It is clear from the will that Nogendro believed that a son so adopted would succeed to his own one-third share under the settlement, and that he considered that such share would be a provision for himself and Nogendro's widow. The only devise made by the will is to Ganendro, of the testator's one-third share of certain other property, which he refers to as described "in the schedule written under the former will."

A document purporting to be a former will has been produced by the plaintiff in this suit under somewhat peculiar circumstances. She does not admit it to be the former will referred to in her husband's last will, but the defendants rely upon it. I think, under the circumstances, and at this stage of the case, I am bound to assume that the document so produced is the former will referred to by Nogendro.

(After finding that the devise in this will to Ganendro gave him no interest in Nogendro's residuary property, or in any thing but the specific items enumerated in the schedule thereto, His Lordship continued.)

It is to be particularly noticed that the appointment in the admitted will of Debendro and Ganendro as executors is of a

very restricted character; whatever may be the exact nature of the interest or power of a Hindu executor appointed by will—whether, as argued on behalf of the plaintiff, he takes no estate, or whether, as argued on behalf of Debendro, he sufficiently represents the entire estate of a testator—it seems to me that, in this particular will, Debendro and Ganendro, though called executors, were appointed only for a special purpose, and for a limited period,—that is to say, only to look after, and take care of, the natural or adopted son of the testator during his minority, and only so far as concerned the property in settlement. They were, in my opinion, only constituted guardians and manager for the son (if any), and took, under the will, no further interest or powers as executors.

(His Lordship, after referring to certain transactions with reference to the adoption of a son by the plaintiff under an alleged verbal permission from her husband—to the actual adoption of Gunendro under that permission—to a suit brought by him to establish his adoption, which was dismissed in January 1860—to a bill filed by Debendro to set aside the adoption, and to ascertain the rights of the parties in the settled property, to which the plaintiff was a defendant—to a suit brought, pending Debendro's suit, by a creditor, Bazlur Rahim, for administration of Nogendro's estate, in which suit Debendro and Ganendro were made defendants, but to which the plaintiff in this suit was not a party—to a decree made in Debendro's suit in September 1860, whereby it was declared that the adopted son took no benefit under the settlement, that the plaintiff was entitled to Rs. 400 monthly as maintenance, which the settlement trustees from that time continued to pay to her, and that subject to debts and legacies Debendro was entitled to one-third of the surplus of Nogendro's share, Ganendro and Gunendro to another one-third, and as to the third share all parties were to be at libetry to apply—to a consent decree made in Bazlur Rahim's suit in April 1864, which directed that the real estate of Nogendro should be sold, and the Receiver of the Court be appointed Receiver to collect the outstandings of his estate and also the share of Nogendro in the residuary estate of Dwarkanath, continued:—)

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In my opinion, the present plaintiff is not bound by the decree, or proceedings, in the creditor's suit, and the only property of Nogendro which could be affected thereby is the property devised by Nogendro to Ganendro, and any debts of Nogendro which Ganendro was authorised to collect and get in under the certificate granted to him by the Aliporc Court. Such certificate applied only to debts and moveable estate, and did not give Ganendro any interest in, or any authority to receive, or represent, immoveable estate; as was decided by Sir Barnes Peacock in the two judgments in *Awkinfee* v. *Mee Nay* (1) and *Sevinthia Pillai* v. *Mootooswamy* (2) with respect to a similar certificate under the Act of 1860; and if Debendro and Ganendro have no right to recover and no interest in Nogendro's immoveable estate, any decree made in a suit in which they were the only defendants could not affect the immoveable estate or the person really interested in such immoveable estate. The plaintiff, it is true, has asked that this suit may be taken, so far as it relates to the same subject-matter, as supplemental to Bazlur Rahim's suit. But even if it could be so taken, I think, under the circumstances, she is not absolutely bound by that portion of the prayer.

Ganendronath died in 1869 without issue, having by his will appointed Gunendronath, Jogesh Prokash Gangooly, and Nilcomul Mookerjea executors, and leaving a widow, Samasoondery, who has been made a defendant, but who has not appeared, to this suit.

The present plaintiff, on the 12th July 1875, filed her plaint in this suit against Debendronath and his seven sons, Gunendronath and his three sons, Ganendro's widow, Ganendro's executors, and the three trustees of the deed of settlement. In her plaint she charges that her adoption of Gunendro was without her husband's authority, and therefore void; and that Gunendro has never acted upon it; that Debendro is in possession of the whole of Dwarkanath's estate, and has filed no accounts since 1848; that Debendro has bought up the rights of Nogendro's creditors at reduced prices; that Debendro and Gunendro are in possession of the piece of land specifically devised by Dwarka-

(1) 8 W. R., 1. (2) *Id.*, 2.

nath to Nogendro, and of certain silk factories, either belonging to Nogendro's estate, or purchased therefrom, which last appear to be a part of the property mentioned in the schedule to Nogendro's first will; that she is not bound by the decree of the 24th of September 1860; that she, as widow of Nogendro, is entitled, subject to the life-interests created by the said settlement, to one-third of the property therein comprised. She accordingly prays for a declaration that she is not bound by the decree of the 24th September 1860, and that the settlement deed may be now construed, and that it may be declared that she is entitled to one-third part of Dwarkanath's residuary estate and of the settled property; that accounts of the settled property and of Dwarkanath's estate may be taken, and if necessary, that his estate should be administered by the Court; that, so far as Nogendro's estate is unadministered, it may be administered by the Court; that, in respect of any purchases by Debendro of debts due by such estate, he should only rank as a creditor for the amounts expended by him in such purchases; and that the present suit, so far as it relates to the same subject-matter, may be taken as supplemental to Bazlur Rahim's suit. All the defendants, except the widow of Gunendro and one of the sons of Debendro, have appeared. With those exceptions, written statements have been put in by all the defendants. The plaintiff at this hearing has asked that her suit may be dismissed as against the two defendants who have not appeared, and may be dismissed with costs, as against the sons of Debendro and Gunendro; and I made an order accordingly.

The suit came on to be heard before me in settlement of issues, and Debendro and Gunendro set up three principal grounds why the suit should be dismissed:—1st, that it is multifarious; 2nd, that the plaintiff has no right to sue in respect of any of the matters complained of by her; and 3rd, that the plaintiff is barred by limitation and acquiescence.

I propose to take these objections in their order.

The plaintiff asks relief in respect of three different matters: the administration of the estate of Dwarkanath; the construction

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of the deed of settlement; and an administration of Nogendro's estate, which might also involve an administration of Ganendro's estate. Considerable stress has been placed on the fact that, if the plaintiff can combine in one suit these several subjects, she will be able to get a decree with respect to the settled property, which she could not get if she sued separately for an administration of that property, inasmuch as the whole of it is without the local limits of this Court's jurisdiction. This objection would, no doubt, have great force if the plaintiff was attempting to deal only prospectively with the property outside Calcutta. But in fact her case is that, since 1860, the trustees of the settlement have paid a particular share of the rents of the settled property to Debendro, as executor of Dwarknath's will; and her principal object is to get a construction of the settlement with respect to the rents so paid, which contruction, no doubt, would incidentally affect future rents, and would be a binding decision on title.

Supposing the plaintiff had, in fact, any right or interest under the deed of settlement, and having regard to the wider and more liberal view latterly taken with respect to objection for multifariousness, as shown in the cases of *Pointon* v. *Pointon* (1) and *Coates* v *Legard* (2), I should not have been disposed to dismiss the plaintiff's suit on that ground. But in fact the plaintiff has, in my opinion, no right or interest under the settlement deed, beyond what she has already received, and is now in receipt of, under the decree of the 24th of September 1860. And I think she has neither the right, nor that it would be any material advantage to her, to go behind that decree. She has not the right, because, in my view of the proper construction to be placed on that deed, she was only entitled to maintenance and a residence thereunder; and, with that exception, the sole person who could sue the trustees, or be affected by any decree made against them, was Debendro—1st, in his character of surviving tenant for life; and, 2nd, as executor and trustee of his father Dwarkanath's will, to whom alone the settlement trustees were liable to account; and the only substantial injury which, as a claimant upon

(1) L. R., 12 Eq., 547. (2) L. R., 19 Eq., 56.

Dwarkanath's estate, she may have received, is that a third share was given directly to Ganendro's sons, which probably would not have been given if the Court had had the advantage of considering more recent decisions, the gift in remainder being to a class, some of the members of which might not be, and, in fact, were not, in existence at the time of the settlor's death. But this construction, if erroneous, may probably be, to a great extent, cured when Debendro's one-third comes to be dealt with, on his death.

I think, therefore, that the plaintiff has no cause of action against the settlement trustees, and that her suit must be dismissed against them with costs.

The second main objection is that the plaintiff has no right to sue in respect of any of the matters complained of by her,—1st, because the whole of Nogendro's estate was devised by him to Ganendro; 2nd, because Gunendro, having been adopted by her in fact, is alone entitled to Nogendro's estate, although his adoption may not have constituted him a *cestuique trust* under the settlement deed; and 3rd, because the plaintiff has not been constituted the legal personal representative of Nogendro by certificate, or letters of administration, and is therefore under s. 2 of Act XXVII of 1860 incompetent to sue.

On the first of these objections, I have already held that the devise to Ganendro in Nogendro's will was specific, and not residuary.

With respect to the second objection, the parties would be entitled to an issue, if Gunendro claimed to be such adopted son. But this objection is only raised by Debendro, for Gunendro absolutely disclaims the status of adopted son; and, as he is a party to this suit, and Debendro would consequently be protected by any order made in the suit, I do not think Debendro alone can claim to raise the issue. And, upon the facts stated, it seems to me that it would be impossible to prove or establish such adoption; for a suit in which Gunendro attempted to establish such status has been already dismissed as against the present plaintiff. And, again, if such adoption had been relied on in Debendro's suit on the settlement, the decree

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of 1860, directing payment to the executor of Dwarkanath, would in all probability have noticed it, inasmuch as it did notice the right of Debendro and the rights of Ganendro and Gunendro representing their father, as beneficially interested in Dwarkanath's residuary estate. It certainly would require the clearest possible evidence to make me believe that after Nogendro had so carefully by his will limited the selection of an adopted son, he would have given verbal permission to his minor wife to adopt a son of her own exclusive choice; for that is the allegation in the petition put in for her in the Alipore Court, and to my mind it is quite impossible to read the agreement of March 1859 between Ganendro and his mother, and the two petitions filed at Alipore on behalf of the plaintiff, and to believe that the alleged verbal permission to adopt was ever in fact given by Nogendro to the plaintiff. I am, therefore, of opinion, at all events at the present stage of the case, that this objection cannot prevail.

With respect to the next objection, that the plaintiff is incompetent to sue, inasmuch as she has neither obtained a certificate, nor letters of administration to Nogendro's estate, it appears to me that s. 2 of Act XXVII of 1860 applies to debts and not to claims against executors or trustees. At all events, it does not apply to claims for immoveable property, and therefore, so far as may relate to the residuary immoveable property of Dwarkanath, the plaintiff is not thereby disabled from suing.

I now come to the most serious objection of all, namely, that the plaintiff, and, indeed, that any representative of Nogendro, is barred under the Limitation Act. For the objection as to acquiescence as I take it, only relates to the decree of 1860, by which I have already held that the plaintiff is bound.

Apart from authority, I should have had considerable doubt as to whether the word "legacy," even in cl. 122 of the Indian Limitation Act, applied to a share of residue, the words "distributive share" in that clause applying presumably to undisposed of estate only. But in *Prior* v. *Horniblow* (1), Mr. Baron Alderson decided unhesitatingly that the word "legacy," in 3 & 4 Wm. IV., c. 27,

(1) 2 Y. & C. Ex. Rep., 200

s. 40, included a share of residue. This seems to have been rather a forced construction for two reasons—first, because a share of residue is not, like a legacy, a liquidated amount, but may depend upon long and complicated accounts; and secondly, because the English statute clearly does not provide for the analogous case of a demand by next-of-kin for a distributive share against an administrator. And it is to be observed that V. C. Knight Bruce in *Adams* v. *Barry* (1) said:—"With regard to the case of *Prior* v. *Horniblow* (2), I am not entirely free from doubt, but I am not aware of any decision contradicting it, and I ought not to decide inconsistently with it, unless having a clear opinion that it is not right, which clear opinion I cannot say that I have." But *Prior* v. *Horniblow* (2) has never been overruled, and in fact it may be said to have obtained legislative sanction, inasmuch as by s. 13 of 23 & 24 Vict., c. 38, claims of next-of-kin against administrators are barred in the same way as legatees under the former statute. I am therefore bound to hold that cl. 122 of the Indian Limitation Act, which applies not only to a legacy, but also to a distributive share of the moveable property of a testator or intestate, includes a share of the residue of a testator's moveable property; and therefore that the plaintiff is not entitled to an account of Dwarkanath's moveable property. It must be observed, however, that cl. 122 applies only to moveable property, and the resulting trust under the settlement is undisposed of immoveable estate, which would continue immoveable estate in the hands of Dwarkanath's trustee.

The question then arises whether Debendronath, as to immoveable estate, is to be treated as an express trustee under the Act; or whether the plaintiff's claim for immoveable estate is regulated by cl. 145, which gives a period of twelve years from the time that possession became adverse. In either case, it seems to me she would be entitled to an account against Debendro; for even in the latter case, his possession can hardly be said to have been adverse while any debts of Dwarkanath remained unpaid, and there was no other estate whereout to pay them. And it will be remembered that, by the decree of the 15th May

(1) 2 Collyer, 285, see p. 293. (2) 2 Y & C. Ex. Rep., 200.

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1860, Debendro specially took his one-third share under the decree, subject to the payment of Dwarkanath's debts and legacies.

But I think that upon the true construction of Dwarkanath's will, Debendro must be considered to be an express trustee. For Debendro, Ganendro, and Nogendro were nominated "executors and trustees;" and by his will, Dwarkanath made a number of provisions for strangers, which were to be satisfied at the choice of his executors, either by the appropriation of parts of the testator's own immoveable estate, or by purchases out of his moveable estate. To make these appropriations, the trustees must necessarily be trustees of the testator's immoveable estate, and until these provisions were completed, the claims of the residuary devisees could not be satisfied. The case appears to me to fall within the rule of construction to be found, with the authorities for it, at pages 281 and 282 of the second volume of Jarman on Wills (3rd edition) and at pages 191, 192 of Lewin on Trusts (6th edition) that if a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take such estate, although there be no express devise to them. And this seems to be supported by the decree of the Supreme Court in September 1860, which directed the payment of the surplus rents to Debendro as executor of Dwarkanath; and indeed, in the present case, it was one of the arguments of the defendants, that the plaintiff was not entitled to sue the settlement trustees at first hand, and that they could only be approached through Dwarkanath's trustee.

But even if Debendro was not an express trustee, and if cl. 145 did not apply, the plaintiff would still, in my opinion, and as I suggested to Mr. Evans during his reply, be entitled to an account for twelve years of the surplus income paid to Debendro by the settlement trustees, under the decree of September 1860. In *Adams* v. *Barry* (1), V. C. Knight Bruce says, in continuation of his judgment already quoted:—"It is however, I suppose, not inconsistent with *Prior* v. *Horniblow* (2) to say, that if after April 1822"

(1) 2 Collyer, 285, see p. 293. (2) 2 Y. & C. Ex. Rep., 200.

(being twenty years before the filing of the plaintiff's bill, the corresponding date in this case being the 12th of July 1863), "Thomas Wilson possessed himself of any part of the assets of Samuel Wilson, which ought to have been paid or delivered by Thomas to Sophia Wilson—her claim against Thomas' estate in that respect was not barred when the bill was filed."

So, in this case, Debendro is, under any circumstances, liable to account to the plaintiff for so much of the income of the settled property as has, since the 12th of July 1863, been paid by the settlement trustees, under the decree of September 1860, to Debendro "as executor of the will of Dwarkanath."

But, upon the whole case, I am of opinion that the plaintiff is entitled to a general account of Dwarkanath's residuary immoveable estate; and that she is barred by limitation from claiming an account of a share in his residuary moveable estate, and from claiming any pecuniary legacy, or specific devise, by Dwarkanath to her husband.

I am also of opinion that she is not bound by the decree in Bazlur Rahim's suit; and that, therefore, it is unnecessary, at this stage of the case at all events, to deal with Debendro's purchases of the debts proved in that suit.

And whether the plaintiff is entitled to an unlimited account against Debendro as an express trustee, or to a limited account under cl. 145 of the Limitation Act, or only in respect of payments made to Debendro under the decree of September 1860, and within twelve years from the time of instituting this suit, in any of these three cases, if Debendro claims that any part of the property so to be accounted for has been needed for payment of Dwarkanath's debts or legacies, general accounts of both the moveable and immoveable estate of Dwarkanath must be taken by the Court, to prove whether, and to what extent, Debendro is liable to the plaintiff for the residuary immoveable property so to be accounted for.

Attorney for the plaintiff: Baboo *Kedarnath Mitter.*

Attorneys for the defendants: Messrs. *Trotman* and *Watkins*, and Messrs. *Berners, Sanderson* and *Upton.*

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

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Aug. 16, 17 & 21 & *Sept.* 15.

MORAN AND OTHERS (PLAINTIFFS) *v.* MITTU BIBEE AND OTHERS (DEFENDANTS).

Stamp Act (XVIII of 1869), *s.* 3, *cls.* 18 & 26, *and sched. i, cl.* 10—*Mortgage—Pledge of Property not in esse—Evidence Act (I of* 1872), *s.* 92—*Oral Agreement contradictory to Written Contract—Act VIII of* 1859, *s.* 243, *Powers of Manager appointed by Court under—Manager pending Suit or Administration appointed by Court of Chancery or High Court—Lien of Manager or Consignee of West India Estate—Salvage Lien—Estoppel, Knowledge and Acquiescence.*

M, the manager of an Indigo Concern, under s. 243, Act VIII of 1859, by a deed dated the 1st February 1873, in which the owners of the concern joined, which was duly registered, and which was made with the Court's sanction, mortgaged the concern, and pledged and assigned the season's crop to *A* and *B*, who were pardanishins, to secure repayment of a large sum of money, consisting partly of the balance of previous loans from the husband of *A* and *B*, and partly of a new loan to the extent of what was described in the deed as the estimated outlay of the season. The deed provided that *A* and *B* should have a first charge upon the indigo to be manufactured in the season in respect of the moneys secured thereby; that the indigo should be sold subject to *A's* and *B's* direction; that until the debt was paid, *M* should have no power to transfer, sell, or mortgage the properties thereby mortgaged, pledged and assigned, or in any way to deal with the sale proceeds of the manufactured indigo; and that *A* and *B* should have full power to arrange for the appointment and dismissal of the servants of the concern, and for its better management. Previously to this, namely, in October 1872, *M* had, in pursuance of his letter of appointment, filed an estimate for the season's outlay largely exceeding the sum mentioned in the deed as the estimated outlay, and had alleged that, at the time of executing the mortgage deed, he had informed one *C*, who was the general manager of *A* and *B*, and as such was the only medium of communication between *M* and *A* and *B*, that further advances would be necessary. According to *M's* account *C* told him that *A* and *B* were unable to make further advances, and that he could, if they were needed, obtain them on the usual terms from the plaintiffs, who were indigo brokers. In previous years, during the lifetime of the husband of *A* and *B*, who had held similar mortgages of the concern and of the crop in those years to secure advances made by him, such advances had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans. And it was alleged by *M* that it was upon the understanding that the same

course was to be followed in the present instance, that the mortgage deed to *A* and *B* was executed.

The moneys advanced by the latter were wholly expended by April, when *M*, without communicating with *A* and *B*, and with only the verbal sanction of the Court, applied to the plaintiffs for money, and on the 26th April, the plaintiffs wrote to *M*, that they would make advances to the extent of Rs. 50,000, upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment for *M's* signature which he duly signed, and returned to the plaintiffs on the 3rd May. This document bore a Rs. 2 stamp. In September and October, *M* obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment, which also bore Rs. 2 stamps. Of the moneys thus advanced by the plaintiffs, Rs. 5,000 was paid to *C* for *A* and *B*, by a bill drawn upon the plaintiffs. About Rs. 17,000 was applied towards the expenditure of the following season, and the remainder was applied in the production of the then season's indigo, and *M* stated that without it he could not have manufactured any indigo whatever that season. The indigo, when manufactured was claimed by *A* and *B* under their mortgage, and their claim being resisted by *M*, who set up against them the plaintiffs' rights under the letters of assignment, *A* and *B* brought a suit to enforce the provisions of their mortgage deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued *A*, *B*, *M* and the holders for sale to establish their first charge in respect of their advances to *M* upon 360 maunds of the indigo on the strength of their letters of assignment.

Held per GARTH, C. J., and MACPHERSON, J., that the letters of assignment to the plaintiffs were not mortgages within the definition of the Stamp Act XVIII of 1869, and that the proper stamp to be affixed to such documents is a stamp of 8 annas.

Held per GARTH, C. J., PHEAR and MACPHERSON, JJ., that the alleged oral agreement between *C* and *M* as to obtaining loans, if necessary, from the plaintiffs and giving them a first charge on the season's indigo in respect of such loans was in direct contravention and defeasance of the mortgage deed to *A* and *B*, and was therefore inadmissible in evidence under s. 92 of the Evidence Act.

Held per PHEAR, J., that s. 243, Act VIII of 1859, does not give the Court authority to appoint a manager to carry on a judgment-debtor's business pending execution proceedings and to invest him with power to raise money for that purpose. *Quære*—Whether the Civil Courts in the Mofussil have the power possessed by the Court of Chancery in England and by the High Court in Calcutta of managing the property of parties to a cause pending suit or administration. But however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and

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expenditure against the parties to the suit or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court.

Held per GARTH, C. J., and PHEAR, J., that the plaintiffs were neither in the position of managers, of the concern nor of consignees of the indigo, and were therefore not entitled to any lien upon the indigo similar to the lien possessed by the manager or the consignee of a West India Estate.

Held per PHEAR, J., that the plaintiffs could not claim a lien on the indigo on grounds of a salvage character; it being essential to such a lien that the person spending the money of which he claims reimbursement should have some interest in the property, or some right or duty towards the owners who are to be affected by the claim, impelling him to make the expenditure. A mere volunteer can in general claim no such lien.

Held on the facts *per* GARTH, C. J., PHEAR and MACPHERSON, JJ., that there was not evidence of such knowledge and acquiescence on the part of *A* and *B* with respect to the advances by and the assignments to the plaintiffs as would estop them from disputing the plaintiffs' claim.

APPEAL from a judgment and decree of PHEAR, J., dated the 6th March 1876.

The plaintiffs, who carried on trade as indigo brokers in Calcutta under the style of Moran and Co., sued to establish their right to a first charge on 860 maunds of indigo, the produce of the Arrowah Indigo Concern in the season 1872-73 for over Rs. 70,000, a portion of the moneys advanced by them for the purposes of the concern.

Kazi Ramzan Ali, deceased, the late proprietor of the Arrowah Concern, being largely indebted, and numerous attachments having issued against this and other properties belonging to him, petitioned the Court of Sarun to appoint a manager of the concern, and in October 1867 one Urquhart was appointed manager under s. 243 of the Civil Procedure Code. In the year 1870, one Macrae was appointed manager in Urquhart's stead, and a letter of appointment was given to him by the Court, under which he was directed "to file an estimate of expenditure to carry the factories on during the subsequent year," and until further orders to "file such estimates for every year in this (the Sarun) Court," and was further directed and empowered as follows:—

"The expenses for carrying on all the factories or any of them

will be raised and paid by you. The amounts of the receipts and disbursements of all the factories and houses will be submitted by you in every month up to the 20th of every month with your signature. The yearly accounts of the factories ending on the 31st October of every year will be submitted by you on or before the 31st December of every year as long as the factories continue under the management of this Court."

Ramzan Ali died in 1869, but his estate continued after his death to be managed as theretofore for the benefit of his heirs and all parties concerned.

For several years the Arrowah Concern had been carried on mainly by means of advances made by one Banwarilal, a native banker, upon mortgage bonds executed from time to time by the manager, with the approbation of Ramzan Ali and his heirs, and with the sanction of the Court of Sarun. Banwarilal's advances had been supplemented, during the last two years of his life, by loans obtained from the plaintiffs and other Calcutta indigo brokers. In April 1872, Banwarilal died, leaving the defendants, Mussamuts Mittu and Munder Bibi, his widows and representatives. At the end of the season 1871-72 there was due from the Arrowah Concern to Banwarilal's estate a sum of more than four lakhs of rupees. The clear proceeds of the sale of the season's indigo amounted only to Rs. 1,81,325-13. In October 1872, Macrae filed his annual estimate, stating that Rs. 1,75,713 would be needed for the season 1872-73, and this estimate was sanctioned by the Judge. Macrae subsequently entered into negotiations with one Monohur Das, who was described as the general mooktear of the Mussamuts, to obtain advances from those ladies; and on the 1st February 1873, Macrae executed a mortgage bond in the Mussamuts' favour for the sum of Rs. 1,81,325-13. The bond recited that Rs. 1,31,325-13 were absolutely necessary for the purpose of carrying on the concern for the year 1872-73, and that Rs. 50,000 were payable under an order of the Judge of Sarun to certain judgment-creditors of the owners of the concern, making in all the sum for which the bond was given. The bond further recited that Macrae was unable to raise this sum except by loan from the Mussamuts, and

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that he had obtained the Judge's permission in writing to raise this sum and to execute the bond. By this bond Macrae, in consideration of Rs. 1,81,325-13, which he thereby acknowledged to have received from the Mussamuts, promised to repay the unpaid balance of the original debt due to the Mussamuts and the Rs. 1,81,325-13 then borrowed (which was described in the deed as "the estimated outlay for the present season and the debts due to the judgment-creditors") with interest at 12 per cent. and a commission of 5 per cent. on the Rs. 1,81,325-13; and as security therefor mortgaged to the Mussamuts the indigo lands and factories, and pledged and assigned to them the season's crop. The bond further provided that the indigo to be manufactured from such crop should be sold by Macrae wheresoever and in such way and by such firm as the Mussamuts should direct; that the principal interest and commission due to them should constitute a first charge on the sale proceeds; that until such principal interest and commission should be paid in full, Macrae should have no power to transfer, sell, or mortgage the properties thereby mortgaged, pledged, and assigned, or in any way to deal with the sale proceeds of the manufactured indigo; and that the Mussamuts should have full authority to make arrangements for the appointment and dismissal of the servants of the concern and for its better and more economical management. The owners of the Arrowah Concern joined in executing this bond, and the bond was registered under the Registration Act. The sum so lent by the Mussamuts for the season's expenditure was wholly spent by April 1873 before the crop was raised, and Macrae thereupon, notwithstanding the provisions and stipulations contained in the above deed, and without applying to the Mussamuts for further advances, or informing them that the Rs. 1,31,325-13 were spent, with the verbal sanction of the Court, applied to Moran and Co. "to procure a loan for the concern to complete the season, as they had done in the previous year, on the security of the indigo." After some correspondence Moran and Co. wrote to Macrae on the 26th April.

DEAR SIR,

"On receipt of your favour of the 23rd instant, we went to see Messrs.

Lyall, Rennie and Co., who, for some reason or another, have changed their minds and decline making the advances. We are much annoyed at their having been the cause of our giving you so much unnecessary trouble, but we have no desire that you should suffer by their vacillation, and therefore we advance the money on the same terms and conditions as they had entertained, *viz*:—

We to advance	Rs. 50,000
To be drawn as follows:	
1st June	Rs. 20,000
1st July	„ 5,000
1st August	„ 5,000
1st September	„ 20,000
	Rs. 50,000

"You as security to give us an assignment of the first 250 maunds indigo to be manufactured this season at the Arrowah Indigo Concern, and you guarantee the same shall take precedence of any claim or decree whatsoever; you pay us interest at the rate of 10 per cent. per annum and a commission of 2½ per cent. in advance. We enclose for your signature a form of assignment to be signed by you either now or when you require the first instalment of the loan.

Yours faithfully,
(Sd.) WILLIAM MORAN AND CO."

Macrae, on the 3rd May 1873, duly signed and returned to Moran and Co. the form referred to in the above letter, which form was in the following terms:

"In conformity with the tenor of a letter received from William Moran and Co., dated the 26th day of April, copy of which is annexed, and pursuant to directions received from William Moran and Co., I do hereby certify and declare that I will hold 250 factory maunds of indigo, the first manufacture of this season of the Arrowah Indigo Concern in Chupra, as the property and at the disposal of William Moran and Co. for and on behalf of the said William Moran and Co., and that I hereby undertake to continue so to hold the above indigo for the sole use and disposal of the said William Moran and Co., or at the order and direction of the said William Moran and Co. and to consign it at the usual period, or when required, under invoice addressed to the said William Moran and Co. or to their order. Dated at Arrowah Factory in Sarun this 3rd day of May in the year of our Lord 1873.

(Sd.) J. MACRAE."

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This document bore a 2-re. stamp. In September and October 1873, Macrae applied to Moran and Co. for further advances of Rs. 12,500 and Rs. 10,000, and signed two forms in precisely the same terms as the above, with the exception that the indigo purporting to be thereby assigned was 60 maunds and 50 maunds respectively. These documents likewise were stamped with 2-re. stamps.

Under these three instruments Moran and Co. advanced to Macrae the sum of Rs. 88,557. Of this sum Rs. 5,000 were received by Monohur Das on behalf of the Mussamuts by a bill drawn upon Moran and Co., and a portion of the amount was applied by Macrae for the purposes of the season 1873-74. In September 1873 the Mussamuts claimed under their mortgage possession of the indigo which had then been manufactured from the season's crop, but in this they were resisted by Macrae, who set up against them the rights of Moran and Co. under the assignments which he had given to them. Upon this the Mussamuts, in November 1873, instituted a suit in the Subordinate Judge's Court of Sarun against Macrae, the manager, and against the owners of the property, parties to their mortgage, and others, to enforce the provisions of the deed, and obtained an attachment of the indigo before judgment; and in April 1874 they obtained a decree in that suit declaring their right on the footing of the mortgage deed to take possession of and to sell the indigo as against Macrae and the owners of the concern.

In the meanwhile the indigo had been sent—still subject to the Court's attachment, it was said—to Messrs. Thomas and Co. in Calcutta for sale; and in the ordinary course of affairs Messrs. Thomas and Co. on selling would have transmitted the proceeds of the sale to the Subordinate Judge's Court at Sarun towards satisfaction of the Mussamut's mortgage debt. To prevent this, Moran and Co. brought the present suit against the Mussamuts, the owners of the concern, Macrae, and the members of the firm of Thomas and Co., seeking, amongst other things, to obtain possession of the indigo, which was then in the hands of Thomas and Co. for sale in Calcutta, and to establish a lien upon it to the extent of 360 maunds, on the strength of the

assignments made to them by Macrae, and to restrain Thomas and Co. from selling or parting with the sale proceeds of the indigo.

The plaintiffs in their plaint, and the defendant Macrae in his written statement, alleged that when the Mussamuts agreed to advance Rs. 1,81,325-13, Macrae informed them that as out of this sum Rs. 50,000 would have to be paid to judgment-creditors under the Court's order, only Rs. 1,31,325-13 would be applicable for outlay; that this sum would only carry on the concern till about May, and that it would be absolutely necessary to raise more money; that the Mussamuts informed Macrae they could not advance a larger sum, and that if further advances were necessary he could obtain them as before from Calcutta; that the Mussamuts were unable to advance the outlay required, and that they, by their agent Monohur Das, who was fully authorized for the purpose, agreed with Macrae that he should borrow such further sums as might be necessary for carrying on the concern from the plaintiffs' firm, as had been done before, and that he should grant to the plaintiffs a first mortgage or charge upon so much of the season's crop as should be necessary to secure the plaintiffs' advances; and that they further agreed to waive their priority in favour of the plaintiffs in respect of such sums as the plaintiffs should advance.

The Mussamuts, in their written statement, denied every one of these allegations, and stated that the plaintiffs' loans were made without their knowledge or consent.

By an order made in the suit before the hearing, the defendants, the members of Messrs. Thomas and Co., were directed to sell the indigo in their hands and to pay Rs. 80,226-1-6, part of the sale proceeds, into Court to the credit of this suit, and to transmit the balance of the sale proceeds to the Court of the Subordinate Judge of Sarun, and upon complying with this order, the suit as against them was dismissed.

The plaintiffs' suit was dismissed in the Court below by

PHEAR, J. (who, after stating the facts, continued, with reference to an objection raised to the admission of the plaintiffs' letter

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of the 26th April and Macrae's letter of assignment to the plaintiffs, dated the 3rd May).—It appeared to me that these two documents together constituted a promise or undertaking on the one side to pay money at certain specified future periods, and a pledge on the other of property to arise at a future time made by way of securing repayment of the money so to be advanced, with a guarantee of title to assign. Neither of the two documents was complete by itself, and I thought that the 2-re. stamp, which the second of them bore, was not sufficient to meet the requirements of the Stamp Act in respect of the contract which the two disclosed.

On a former occasion I threw out the suggestion that an undertaking at a given time on the part of one person to hold, at the disposal of another, property which is to be acquired in future, might not be a pledge of property within the meaning of the Stamp Act, and Macpherson, J., seems to have taken this view when sitting in the Court of first instance in the case to which I refer (1). But I now do not think the suggestion is sound, and even if it were, it would not in my opinion save the two documents, with which I am at present concerned.

It is noteworthy that the plaint, in describing the transactions of the second and third assignments, omits to set out the letter of promise, which constitutes the consideration for the pledge in each of them, and makes the pledging document refer for consideration to a letter of notice written by Messrs. Moran and Co. on the assumption that the pledge had already been effected. I need hardly say that this gives the pledging document a singleness of character which it does not really possess.

But although the plaintiffs, for the reason which I have just now explained, have failed to establish by evidence the assignments of indigo to them upon which they have mainly relied in this suit, I may remark here that I do not think that their case has materially suffered thereby; because even if it be taken that those assignments were in fact made by Mr.

(1) *Moran* v. *Spink*, a report of the judgments in this case will be found in 21 W. R., at p. 161. The observations with respect to the stamp were made in the course of the argument.

Macrae in favour of the plaintiffs, as described in the plaint, it appears to me, upon grounds which I shall probably have occasion in the course of this judgment to make clear, these assignments could not, upon the case made by the plaintiffs, have the effect of passing to the plaintiffs an interest in the indigo detrimental to the Mussamuts' prior rights under their mortgage of the 1st February.

However this may be, the assignments being put on one side, it is still certain on the evidence that Messrs. Moran and Co., from time to time, subsequently to the date of the Mussamuts' loan, advanced to Mr. Macrae the sums of money, which it was the intention of the assignments to secure, and that these sums, or a portion of them, were applied to the purpose of manufacturing the indigo, which is the subject of this suit. Mr. Macrae in his deposition says :—

"I did, in pursuance of the said agreement, borrow Rs. 65,382-11-6 from Moran and Co., on account of season 1872-73; and I should not have been able to manufacture the quantity of indigo that I did manufacture, had I not got the necessary funds from Moran and Co.; in fact, I could not have begun manufacture at all had it not been for those funds, for the season would have been lost."

It becomes, therefore, necessary to inquire whether, by reason of this application of their money, the plaintiffs obtained any lien on the indigo of the season 1872-1873, or any right to be repaid the money advanced by them or any part of it, before the money in Court, the proceeds of that indigo, is allowed to go into the hands of the Mussamut defendants, as mortgagees.

The case has been likened to that of a consignee or manager of a West Indian estate, and a considerable number of decisions have been brought under my attention in argument, which bear upon the question as to such a person's rights as against others interested in the property. In *Morrison* v. *Morrison* (1) Vice-Chancellor Stuart, in dealing with a case of consigneeship, said:—"It is, therefore, necessary to distinguish accurately what has been said by various Judges of this Court as applying to the case of a consignee

(1) 2 Sm. & G., 564, at p. 572.

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who seeks reimbursement on the footing that he has a lien on an estate preserved by his expenditure during a management conducted by arrangement with the owners, from what must be kept in view as to the rights of a consignee acting under the direct appointment of this Court, and making advances sanctioned by its orders." And in *In the matter of Tharp* (1), Lord St. Leonards said, in reference to the equitable rights of a consignee,—" I apprehend that, generally speaking, with reference to the equity of West Indian estates, it could hardly ever have gone beyond this, as I said in the course of the argument, that, where consignees were supplying the estate as they ought to do, sending out all the supplies, all the machinery, all the clothing, all the food in point of fact, except what was found in the place itself, and were receiving back, as they did, all the produce of the estate, except what was sold, the common portions of it sold in the island, and keeping the accounts as they did, and charging their commission, there then was a balance on their accounts, which in the case of a tenant for life would not have properly gone to the tenant for life, until their account was cleared, and they could not and ought not to have allowed the tenant for life to have received any portion of these profits, if they were dealing with a tenant for life, until their account was paid; and if in that case, after the tenancy for life, it turned out there was still a balance due, and that balance had been properly incurred in maintaining the estate, then it might properly be represented as money laid out for the benefit of the inheritance; and therefore that balance at that period ought to be a charge on the tenancy in remainder of the estate." Lord Kingsdown, in *Fraser* v. *Burgess* (2), reviewed many of these cases, and expressed the opinion: " There seems to be no principle for holding as a general proposition that the agent employed in the management of an estate in the West Indies by the owner of the estate, subject to charges upon it, can without more have a lien on the inheritance of the estate for the advances which he has made for its cultivation, not only against his employer but against those whose title is prior to that of his employer, and who have had nothing whatever to do with the expenditure.

(1) 2 Sm. & G., 579. (2) 13 Moore's P. C., 314, at p. 343.

"When a trustee is in possession of the plantation, managing it on behalf of all parties, and employs a manager for the purpose, the expenses and proper advances of the manager for the benefit of the estate are the expenses and advances of the trustee, who is entitled to be reimbursed out of the estate, and if the manager were held entitled to be paid out of the estate, it would be as standing in the place of the trustee who employed him.

"Again, when the Court of Chancery takes possession of the estate by the appointment of a manager and receiver, it is by its officers in possession on behalf and for the benefit of all persons interested, parties to the suit; and its officers stand in at least as favourable a position as the officers appointed by trustees and are entitled to at least as extensive remedies against the estate." He then pointed out some differences in the cited cases, and said: (1) "To this extent, however, the cases all agree, that when the Court of Chancery has taken possession of a West Indian estate by a manager and consignee, it will, as against all parties for whose benefit the possession has been held, refuse to permit its officers to be discharged until the amount due to them has been paid. But the cases seem to go further, and to establish, that where the possession has been held by the attorney and manager of the mortgagor, yet if the mortgagees have so recognized the possession of the manager that he can be considered as acting on their behalf and for their benefit, the same consequences will follow, as regards their interests, as if he had been appointed under the authority of the Court." And finally he states the conclusion of their Lordships of the Judicial Committee in that particular case thus: "On the whole, after a careful examination of the evidence, and a full consideration of the case, their Lordships have come to the conclusion that Grant must be considered to have been in the management of this estate on behalf of all parties interested, and under the authority of the Court of Chancery; and that the proceeds arising from the sale being now to be distributed according

(1) at p. 346.

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to the rights of the several parties having claims upon it, the appellant, as the executor of Grant, is entitled to be paid what is due to him in respect of his management, in priority to the claims of the persons having charges under the will." Also in the course of the judgment Lord Kingsdown remarked, "it is very difficult to understand what difference there can be between the case of a manager and that of a consignee of a West Indian estate with respect to the right of lien," and he pointed out that in the case of one of the leading decisions the question arose in the case of a manager. And in *Bertrand* v. *Davies* (1), the Master of the Rolls summarized the results of the cases thus: "The three following propositions may, I think, be decided from the above mentioned cases.

"In the first place, that a lien on the estate exists for the costs of management where the management has been conducted by a person authorized to do so by the owner of the property.

"In the second place, that though there be no express appointment of the manager, yet, if the persons interested in the estate know that he is performing the duties and do not interfere, then they must be presumed to have acquiesced in his continuance in that office, and they cannot dispute his claim to a lien on the estate for the expenditure, which, by their tacit acquiescence, they have encouraged him to make.

"In the third place, where a receiver or manager is appointed by the Court, in a suit properly constituted, such manager is to be considered as appointed on behalf of all persons interested in the property, and he is entitled to his ordinary commission and allowance, and also to a lien on the estate, as against all persons interested in it, for the balance, whatever it may be, that shall be found to be due to him on taking his accounts."

I have already quoted words of Lord St. Leonards, describing what it is that gives the consignee of a West Indian estate his peculiar character, and furnishes the basis of his peculiar rights. Lord Westbury, in delivering the judgment of the

(1) 31 Beav., 429, at pp. 435, 436.

Privy Council in *In re Leith's Estate, Chambers* v. *Davidson* (1), says also on this point. "The ordinary mercantile character and position of a consignee of a West Indian plantation are well known. The custom of the mercantile world is to select, as consignee, a merchant residing in this country, to whom the whole produce of the Plantations is consigned, and who, in return for that produce, accepts bills drawn upon him by the proprietor or manager in the West Indies for Island contingencies; and who, according to the orders of the manager or proprietor, purchases the supplies needed for the estate, and sends them over to the Island. There is no necessity in a case of this kind that there should be any contract for the purpose of determining the right of the consignee. The right of the consignee, as it is supposed to be established by decisions, giving him a lien on the plantation in respect of the balance due to him, is an exception to the general rule which applies to principal and agent."

Now it is certain that the plaintiffs were not themselves in any sense the managers of the Arrowah Concern, and I think it is abundantly apparent on the facts of the plaint that the situation in which they stood to the concern was materially different from that which these eminent Judges make the foundation of a consignee's rights relative to a West Indian estate. I might, therefore, dispose of this part of the case at once by saying that the plaintiffs have not brought themselves within reach of the principles to which they appeal.

It may, however, perhaps be open to question whether or not they are entitled to stand in the shoes of the defendant Mr. Macrae as against the Mussamuts, and it may, therefore, be as well to inquire, what precisely is that gentleman's position in the matter. The sanad granted by the Judge of the Sarun District Court runs thus:

(His Lordship read the sanad, and continued).

So much of the authority and powers conveyed by this document, as is derived from, or rests upon, the enactment of s. 243 of Civil Procedure Code, and for that reason might conceivably be good against all the world, is, I think, limited

(1) L. R., 1 P. C., 296, at p. 304.

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in extent. The words of the section which apply to the case are:—

"When the property attached shall consist of debts due to the party who may be answerable for the amount of the decree, or of any lands, houses, or other immoveable property, it shall be competent to the Court to appoint a manager of the said property, with power to sue for the debts, and to collect the rents, or other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards the payment of the amount of decree, and costs." It seems to me that the Legislature did not intend by thus using the word "manager" to imply by the force of that word alone that the person appointed should have power to manage and carry on the property, whatever its nature, in respect of which he is appointed: I think that the word is a mere designation of a person, whose power is specified in the following sentence, namely, "with power to sue for the debts, and to collect the rents and other receipts and profits of the land or other immoveable property, and to execute such deeds or instruments in writing as may be necessary for the purpose, and to pay and apply such rents, profits, or receipts towards payment of the amount of the decree and costs." The same word "manager" is thus used in reference to cases where obviously there could be nothing to manage, and where the person appointed could be nothing more than a receiver, as to others; and in the powers expressly attributed to him there is nothing which would enable him to carry on any business, or to raise money for that or any other purpose. He appears to be even narrowly restricted in regard to the application of the rents and profits which he may collect, *i.e.*, to paying them towards the amount of the decree and costs. It is also not unimportant to remark that in the immediately following passage of the same section the Legislature employs express words to authorize the Court to raise money, by means short of selling the land, for the purpose of discharging the judgment-debt; if it had intended to give the "manager" or even the Court a like power for the purpose of merely managing the

property or carrying on a business concern, with a view to discharging the judgment-debt out of the profits, it surely would have conferred the power expressly among the other powers mentioned, and would not have let it simply lurk under cover of the name "manager." The last words of the section "In any case in which a manager shall be appointed under this section, such manager shall be bound to render due and proper accounts of his receipts and disbursements from time to time as the Court may direct" do not enlarge the passage which I have quoted, because a mere receiver must, or may, have to disburse money in the course of collecting rents and profits and suing for debts, &c.

On the whole, I feel bound to say that I cannot find in s. 243 any legislative authority given to the Court to appoint a manager to carry on a judgment-debtor's business pending execution proceedings, and to invest him with power to raise money for that purpose, although I am aware that a practice of this kind has, on some ground or another, become very prevalent. And I need hardly add that if a manager appointed under s. 243 has not in himself any statutable authority to carry on and manage a business or other property, he certainly has no authority to hypothecate produce, &c. for expenditure to that end.

I do not know whether it has been decided to what extent the Civil Courts of the Mofussil have the power such as that possessed by the Court of Chancery at home, and by this Court, of managing the property of parties to a cause, pending suit or administration; or, if so, whether their power in this respect arises in proceedings had solely for the purpose of enforcing execution of a decree. But, however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and expenditure against the parties to the suit, or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court. The ground of his right is that he is the Court's officer acting under the Court's discretion as between the parties to the suit and with the Court's sanction

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which cannot of course be rightly given without specific inquiry in each matter requiring sanction; the exercise of the Court's discretion cannot be delegated to the manager by anticipation. Now nothing whatever of the kind appears here in the matter of the three assignments to the plaintiffs. It is not pretended that the Court of Sarun made the slightest judicial inquiry in regard to either of them, or gave any other formal sanction to Mr. Macrae's action in making them than is involved in this passage of the sanad granted three years before, "the expenses for carrying on all the factories or any of them will be raised and paid by you." The utmost that appears in the evidence of what took place on this point amounts to this that Mr. Hope, the Judge of Sarun, personally knew in a general way what Mr. Macrae was doing or about to do. Mr. Macrae says, "I applied to him verbally in Court for a written authority for raising the loan from Moran and Co., but he said that he considered a written order unnecessary. I cannot bring to my mind the date, but I spoke to the Judge in February about the time that I signed the bond in the Mussamuts' favour. I told him that the funds allowed by the Mussamuts would be insufficient for the disbursements of the year, and it was then that he told me to arrange with Moran and Co. when the money should run out." Had there been any proper inquiry in each case the Court must have given formal notice of it to the Mussamuts, and the result of the inquiry might have been that there was no need of borrowing from the plaintiffs and of hypothecating the crop to them, or if there was such need, even then the order given sanctioning the expenditure and making an hypothecation of the crop in priority to the Mussamuts' existing rights to it, could only be made binding by adding the Mussamuts as parties to the record (if the Court had authority to do so), and in that event the Mussamuts would have the right of appeal against the order. How very much short of all this Macrae's action in the matter falls is not difficult to perceive.

If, therefore, it be taken, as it probably may on the facts stated in the plaint, that Macrae was manager of the Arrowah Concern under the Court of Sarun pending execution proceedings (so far as the Court had authority to undertake such management)

for the benefit of the Mussamuts as well as that of other persons parties to the suit, still he does not appear to have had from that source the requisite authority to charge the estate with these advances as against them: certainly no authority to do so in defeasance of the very deed of hypothecation which he and the owners together had made to the Mussamuts only a few months before.

The plaintiffs, therefore, whether their assignments are considered as proved or not, can get no advantage as against the Mussamuts by virtue of Macrae's official character or personal rights.

And it is worthy of remark that even if Macrae himself were in a position to set up a lien on the estate block and crop, or on the season's crop alone in respect of his expenditure incurred in producing it, that expenditure included the Mussamuts' money as well as the plaintiffs'. He could only claim for the balance of his entire accounts in which the Mussamuts' items would be prior to those of the plaintiffs'.

It seems, therefore, to be quite plain that the plaintiffs were neither legally nor in fact consignees of the produce of the Arrowah Concern, or of any part of it (for the indigo was not sent to them), nor in the position of manager thereof. Neither can they found the claim which they put forward in this suit upon any ground analogous to that on which the right of lien of a manager might be made to rest.

Had the three assignments of indigo by Macrae to the plaintiffs been made out by the evidence, the next question would have been, was there any thing in the shape of an authority for making these assignments proceeding from the Mussamuts to Macrae. And I will say a few words upon this question for the sake of elucidating the rest of the case.

The defendant Macrae in his deposition says that he obtained the requisite authority for this purpose at the time when the deed of the 1st February 1873 in favour of the Mussamuts was executed. His account of the matter is this.

(His Lordship read Macrae's evidence to the effect that when he executed the bond in favour of the Mussamuts he informed Monohur Das that Rs. 1,75,613 would be needed for the

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season's outlay, and that Monohur Das thereupon told him that, in the event of the money advanced by the Mussamuts proving inadequate for the season's expenditure, he might obtain loans from Moran & Co. and might pledge with them sufficient of the season's crop as security for their advances in priority to the Mussamuts' mortgage. Upon this his Lordship observed that "if a clause had been inserted in the Mussamuts' bond embodying the parol authority which Macrae considered to have been thus conveyed to him, its effect would have been to contradict and materially alter the written contract, and therefore parol evidence was not admissible to show that it formed part of the contract." He accordingly found that the authority contended for as having been passed to Macrae simultaneously with the making of the Mussamuts' mortgage was not established. And he further expressed great doubts on the evidence whether Monohur Das ever went the length, which Mr. Macrae now said he understood him to go. It might well be that Monohur Das said generally that in the event of more money being wanted it might be got from Messrs. Moran and Co., or any one else in Calcutta, in like manner as in former years, but the learned Judge was not satisfied that he pretended to pass immediate specific authority for that purpose. He then continued.

And if Mr. Macrae got no authority from the Mussamuts to make assignments, which should have the effect of overriding their deed, at the time when that deed was made, it seems to be certain that he did not get any afterwards. He admits that he never applied to them for any such authority, and, that which passed verbally at the time of the making of the deed being out of the way, he cannot place the case any higher than this, namely, that the Mussamuts through Monohur Das knew and acquiesced in what he did. That their conduct in the matter, on the whole, was such as to estop them from now denying, that in making the assignments to Messrs. Moran and Co., he acted with their sanction and authority. I need hardly say that it requires very clear evidence of knowledge and of standing by to establish an effective estoppel of this kind. But the plaintiffs do not adduce any direct evidence of actual knowledge on the part of the Mussamuts of Mr. Macrae's acts,

until at earliest some time after the three assignments had been made. The facts advanced by them to furnish the estoppel are, that Monohur Das acted in all things as the agent of the Mussamuts, managed all their affairs for them, and appeared to be their am-mooktear empowered to represent them in all matters; that he knew of and even directly suggested Mr. Macrae's drawings on Messrs. Moran and Co., for money wherewith to carry on the Arrowah Concern, and of the assignments of the season's indigo made by Mr. Macrae to secure Messrs. Moran and Co.'s loans; and that he even obtained at his own request from Mr. Macrae for the Mussamuts' use and benefit the sum of Rs. 5,000, portion of these drawings so secured; and finally that one of the two ladies, on some occasion after they had brought their suit in the Subordinate Judge's Court to enforce their right under their mortgage to the season's indigo, expressed her willingness that Messrs. Moran and Co. should be first paid. If these facts can be accepted as proved (and I am very far from saying they can, for the evidence bearing on them, perhaps from the fault of the examiner, is most indefinite and unsatisfactory, and some of it is even untrustworthy), still they fall short of affording material for the estoppel. It is remarkable that it is not attempted, on the part of the plaintiffs, to show that the Mussamuts, or even Monohur Das had notice, or were aware, of any specific drawing or assignment as it occurred. And there is also nothing to indicate that any one concerned except Macrae and the plaintiffs knew of the preferential character of the assignments. This only appears in Messrs. Moran and Co.'s letter to Macrae, the first of the two documents which constitute Mr. Macrae's contract of assignment to them. And in its absence the assignments would be nothing more than second mortgages. I cannot infer from these materials that the Mussamuts knowingly stood by and permitted Mr. Macrae to obtain from the plaintiffs money for the concern, on a pledge of the season's crop which should take priority of their own.

And the attitude assumed by Mr. Macrae throughout the affair seems to me of itself sufficient to forbid any such inference. He held himself entirely independent alike of the ladies and of

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the owners. He did not consider that he was under any obligation to consult them. The property was in the management of the Court by his hands, and he was expressly authorized by the Court to raise the necessary monies at his own discretion. He made his bargain with Messrs. Moran & Co., in his own name without pretending to be the agent of any one, other than the Court, and he went to them because other sources to which he had been accustomed to have recourse in former years, were not this year conveniently open to him. And every one concerned shared this view of Mr. Macrae's independent authority. Abdul Hye states as much in his deposition. And I have very little doubt that neither the Mussamuts nor even Monohur Dass ever supposed for a moment that Mr. Macrae possessed no authority to deal with the indigo except such as he might derive from them or from the owners of the concern. It seems to follow plainly that no legitimate inference adverse to their rights can be drawn from their non-interference with him in the matter of the assignments.

In their written statement the Mussamuts, admit that they have been repaid by Mr. Macrae the sum of Rs. 5,000 part of their mortage debt. And Monohur Das in his deposition states that the repayment was effected by Macrae drawing a hundi on Moran and Co., in favour of the Mussamuts, which was realized by him, Monohur Das, as their agent. Now the Mussamuts must probably be taken to have known that Macrae could not procure the money wherewith to repay them except by disposing either in the way of sale or mortgage of a portion of the property which formed the subject of their mortgage, and I was at first doubtful, whether, under these circumstances, by accepting the payment they did not by implication sanction the actual pledge by which it was raised, at least to the extent of Rs. 5,000. On consideration, however, I do not think it is necessary to come to a finding on this point, because Macrae, acting for the owners, could make a second mortgage without the Mussamut's sanction, and there is nothing whatever to justify the inference that these ladies gave their assent not merely to a second mortgage, but to one which, though made after, should have preference over their own.

I come now to the last principal question in the case, the only question indeed, which has given me cause for serious hesitation in coming to my decision. I will put it in this general form, can the plaintiffs Moran and Co. claim a lien upon this indigo on grounds of a salvage character?

Mr. Macrae in his deposition states, as I have already mentioned, "I should not have been able to manufacture the quantity of indigo that I did manufacture had I not got the necessary funds from Moran and Co.; in fact, I could not have begun manufacture at all had it not been for those funds, for the season would have been lost." And the witness Mahomed Ishhake, assistant manager of the factory, is more specific; he says:—"The one lakh and thirty-one thousand odd," borrowed of the Mussamuts, "had been exhausted in factory disbursements up to April 1873. The concern, therefore, stood in further need of money, and it was to meet further expenses that the loan from Moran and Co. was taken; there was absolute need for this money; the indigo could not have been manufactured without the further loan above stated."

Lord St. Leonards gives an instance of salvage lien in the observations made by him in *In re Tharp* (1), which I have already referred to for another purpose. He says "In Ireland, it is a very common equity to have, as a prior charge to all other incumbrances, what is called salvage money:—Where a leasehold estate, or an estate held for lives to which half-a-dozen people are entitled in succession, many of them being mortgagees, according to certain priorities, the last man of all who is entitled after everybody, being in possession, redeems, I may say, the estate by paying the landlord, who otherwise would have recovered the estate, and taken it from everybody; this payment is what is called salvage money. That is an established equity, and a very proper equity. He that pays the salvage has a prior incumbrance to every other charge and interest, because, so far as any interest is left to any body beyond the charge, it is acquired by that payment, in the shape of redemption money."

(1) 2 Sm. & G., 578.

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And there are unquestionably many cases to be found in the books, where it has been held (I am speaking generally) not equitable as between the parties, that the owner of property should be allowed to have the benefit and advantage of ownership, before the person by whose money the property had been produced or preserved was reimbursed. This was so in the cases of the West Indian consignee's and manager's liens which have been already alluded to; but as I understand the equity, it is essential to it that the person spending the money of which he claims reimbursement should have some interest in the property, or some right or duty towards the owners, who are to be affected by the claim, impelling him to make the expenditure. A mere volunteer cannot generally say to an owner of property, I have saved your property for you by my personal exertions, or by the expenditure of my money, and therefore I am entitled to a lien upon that property, whether you agree to it or not for reimbursement and recompense. The nearest approach to this is maritime salvage, but there the right of the salvors rests upon a peculiar ground of public expediency. In the present case Messrs. Moran and Co., stood in no such relation to the estate or to the proprietors of it as to have cause on that ground for spending their money in the cultivation of indigo on it in the season 1872-1873. They were strangers to the estate, and in the situation of ordinary money-lenders with no other motive than the expectation of pecuniary profit from the bargain itself. And there is no doubt that they advanced the money solely on the footing of, and in reliance upon the contract which they made with Mr. Macrae. They admit that they knew, at the time of making this contract, that a prior mortgage already existed, and they could, if they had chosen, by the least possible inquiry, have ascertained exactly what that mortgage was. By putting themselves into communication with the mortgagees, as they might have done they could have secured priority of right over the indigo to themselves, or in the alternative have abstained from making the loan. But they neglected these ordinary precautions, because, as Mr. Murdoch says, they trusted to the representations made to them in the letters of Mr. Macrae. They were content to run

a risk, which with very little care they might have avoided. The maxim *caveat emptor* seems to me to apply. There were no personal relations between the plaintiffs and the Mussamuts to give rise to any equities. No opportunity was afforded the Mussamuts to furnish the money themselves. The plaintiffs had in their power to say in effect to the Mussamuts, we will not advance our money for the production of the indigo which is to feed your mortgage, except on condition that our expenditure is to be a first charge upon it. They did not think proper to do so, and I cannot, on the whole, find any ground of equity upon which this Court ought to supply their omission.

During the argument some comparison was attempted to be made between the case of the hypothecation of the block or crop of an indigo concern by the manager for the purpose of raising money wherewith to carry on the requisite cultivation and manufacture, and the case of hypothecation of a ship or its cargo by the master to raise money for the repair of the ship, and prosecution of the venture. I need not, however, in strictness notice this, inasmuch as the hypothecation of the indigo has not been proved. But it will not, I think, be out of place here for me to remark that the analogy, whatever it might otherwise be worth, must fail in the present case, because even if the requisite exigency existed, the parties immediately concerned, namely the Mussamuts, were at hand, and could have been most readily had recourse to.

The best consideration that I have been able to give to the case has led me to the conclusion that the plaintiffs' claim to the indigo, in priority to the undoubted right thereto of the Mussamuts, cannot be supported on any of the grounds which have been suggested for it.

From this judgment the plaintiffs appealed.

The *Advocate General* offg. (Mr *Paul*,) Mr. *Jackson*, and Mr. *Evans* for the appellants.

Mr. *Branson* and Mr. *Bonnerjee* for the Mussamut respondents.

The defendant Macrae did not appear on the appeal

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The *Advocate General.*—The three documents under which the appellants claimed a first charge on 360 maunds of the indigo were sufficiently stamped and ought to have been admitted in evidence. A contract to pledge property, which, at the time of the contract, is not in existence, is not a mortgage within the General Stamp Act, 1869. Under that Act a "mortgage deed includes every instrument evidencing a pledge of property for securing the payment of money" and "'property' means property being in British India;" see s. 3, cls. 81 & 26. The subject-matter of these contracts had no existence anywhere. [MACPHERSON, J.—Art. 10, Sched. 1 shows that, for the purposes of the Act, there may be a mortgage to come into operation in future. If so, may there not be a mortgage with respect to property to come into existence at a future time?] The property must be in existence when the mortgage is made, though possession of it need not then be given. These documents were in fact mere declarations by Macrae that he would hold the indigo for Moran and Co., if and when it came into existence. [GARTH, C. J.—Did they not give a right to possession of the indigo without anything further?] They only gave a right of suit. So an agreement to sell would not be an assignment requiring registration under the Registration Act; see *per* Peacock, C. J., in *Currie* v. *S. M. Mutu Ramen Chetty* (1) Mr. *Branson* referred to *Fati Chand Sahu* v. *Lilamber Sing Dass* (2). GARTH, C. J.—Specific performance of an agreement to sell might in some cases be refused, for instance, where damages would be a sufficient remedy; but if the deed contained a power to take possession, would not that make a difference?] It might be so where the property was in the possession of the contracting party, but here the property was not in existence. [GARTH, C. J.—Under the Stamp Act a mortgage deed requires an *ad valorem* stamp.] Yes, and here the value could not have been computed as it was not known how much would be advanced. [MACPHERSON, J.—The agreement was to advance up to a specified amount; that would be sufficient to fix the value.] Monohur Das' agreement with Macrae respecting the advances to be obtained from Moran

(1) 3 B. L. R., A. C., 126, at p. 131. (2) 9 B. L. R., 433.

was within the ordinary course of his employment. [GARTH, C. J.—There is no evidence of what the ordinary course of his employment was.] The evidence shows that the Mussamuts were pardanishins, and that he was their general manager and the only medium of communication between them and Macrae; he would have all such powers as the manager of a Hindu lady usually has. MACPHERSON, J.—Whatever he did for the ladies' benefit would be deemed within his authority, but they might repudiate all acts not expressly authorized by them and which were prejudicial to their interests.] The agreement as to these advances was for the Mussamuts' benefit, since without such advances no indigo whatever could have been produced. As to an agent's power, see 3 Chitty Com. & Man., p. 196. [GARTH, C. J.—The alleged oral agreement gave Macrae not merely the right to borrow, but also to give a first charge upon the indigo which was charged with the Mussamuts' debt.] The production of the indigo was a condition precedent to the attaching of the Mussamuts' charge. The mortgage deed purports to be a formal document, but it is silent on points of the greatest importance. It is for the Court to consider how far evidence of a separate oral agreement with reference to such points is admissible; see the Evidence Act, s. 92, provisoes 2 and 3. The money advanced by the Mussamuts might have proved sufficient. The oral agreement was as to what was to be done if it should be insufficient: that was a collateral matter, as to admitting evidence of which see Taylor on Evidence, 5th ed., p. 983. If the evidence that Monohur Das was informed that the sum the Mussamuts proposed to advance would be insufficient be believed, then the Mussamuts' mortgage deed does not contain the whole agreement, and evidence of the oral agreement is admissible—*Harris* v. *Richett* (1). But apart from any such oral agreement, the appellants are entitled to a first charge on the indigo on the principle on which salvage liens rest, a principle which has been applied over and over again to advances and supplies by consignees of West Indian estates; see *Fraser* v. *Burgess* (2). [GARTH, C. J.—

(1) 4 H. & N., 1. (2) 13 Moore's P. C., 314.

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The salvage lien in those cases depends on the peculiar nature of such estates, such as the difficulties of communication with the parties interested in them owing to their distance and so forth.] In *Scott* v. *Nesbitt* (1), Lord Eldon did not base the right on the distance of the property, but upon what he termed "a principle of English law" which equally applied to mines or alum works in England. See further Fisher on Mortgages, 2nd ed., pp. 131, 133, 670, *Myers* v. *The United Guarantee, Co.* (2), *Bertrand* v. *Davies* (3), *Ventura* v. *Richards* (4), *Chambers* v. *Davidson* (5), and *Sayers* v. *Whitfield* (6), where Lord Wynford refused to send the case back to the Master to enquire as to customs respecting charges on West India estates, on the ground that the common law of England is the common law of St. Vincent's, and therefore the rules which regulate the English Equity Courts also regulate the Courts of Equity in that island. Macrae was the agent for all parties interested in the concern, amongst others, for the Mussamuts. Under s. 243, Act VIII of 1859, the Court had power to authorize him to deal with the property in the way he did; but if the Court had no such power, the Mussamuts ought to have applied to have the order sanctioning Macrae's conduct set aside; while the order stands, they cannot be heard to say that the Court had no power to make it. See *Morrison* v. *Morrison* (7).

Mr. *Evans* on the same side.—From the evidence it is clear that Monohur Das knew that further advances were necessary to secure the production of the indigo, and that such advances were being obtained from the plaintiffs upon the usual terms: the principle of the cases in which the owner of property, who allows another under mistake to improve that property, is held liable to pay for the improvements, or of those in which a first mortgagee is postponed to a second mortgagee because he has stood by and allowed the

(1) 14 Ves., 438 at p. 445.
(2) 7 De. G. M. & G., 112 at p. 126.
(3) 31 Beav., 429 at p. 435.
(4) 1 Tay. & B., 66.
(5) L. R., 1 P. C., 296.
(6) 1 Knapp, 133.
(7) 7 De G. M. & G., 214 at p. 223.

mortgagor to induce the second mortgagee to advance money by fraudulent misrepresentation or concealment, would therefore apply. The conversations between Monohur Das and Macrae as to how the further advances were to be obtained did not constitute an agreement in defeasance of the Mussamuts' mortgage deed, but amounted only to a direction as to what was to be done in a certain event, namely, if the Mussamuts' advance should be insufficient. As to compensation in cases in the nature of salvage claims, see the Indian Contract Act, 1872, s. 70.

Mr. *Branson* for the Mussamut respondents.—The oral agreement under which the appellants' claim is inadmissible under s. 92 of the Indian Evidence Act, 1872, being inconsistent with the Mussamuts' mortgage deed, and even if it were not inconsistent with the deed, it would still be inadmissible as adding terms to a document of so formal a character; see illustration *h* to s. 92. Further, the mortgage deed being registered, evidence of a subsequent oral agreement rescinding or modifying it is inadmissible under s. 92, proviso 4. It has been argued that what passed between Monohur Das and Macrae was only a direction or order, and not an agreement; but an order by a principal to his agent in fact involves two contracts—one that the principal will protect the agent if he perform the order; and another, with the third person with whom the agent deals, that the principal will carry out the agreement made by the agent. Secondly, the documents by which Macrae agreed to hold the indigo at the appellants' disposal are inadmissible under the Stamp Act. They purported to confer an interest in the indigo immediately by their own force and without the necessity of any further act on the part of the appellants upon the indigo coming into existence; they are therefore assignments; see the notes to *Ryall* v. *Bowles* (1). [GARTH, C. J.—In *Lunn* v. *Thornton* (2), Tindal, C. J., draws a distinction between a grant of goods which are not in existence and a grant with a license to seize.] At common law the further act of seizure would probably be necessary to pass the property, but in equity it is

(1) 2 W. & Tu L. Ca. in Eq., 4th ed., p. 773. (2) 1 C. B., 379.

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different; see *Holroyd* v. *Marshall* (1). GARTH, C. J.—Suppose goods in England were mortgaged in India by a deed to take effect on the goods being brought to India, would that deed require to be stamped as a mortgage deed?] Both the *factum* of the agreement with Macrae, and Monohur Das' authority to make it, are denied. This is a case in which one of two innocent persons must suffer, but in deciding between them the Court will have regard to the caution displayed by one and the utter want of caution on the part of the other. Macrae cannot stand in any higher position than the owners of the concern would have occupied had they been in possession, and they would have had no claim upon incumbrancers for losses which they might incur in cultivation of the estate—*Fraser* v. *Burgess* (2). The powers with which the Court could invest Macrae are limited by s. 243, Act VIII of 1859. His acts beyond those authorized by s. 243 are *ultra vires* notwithstanding the Court sanctioning it.

Mr. *Evans* in reply.

Cur. adv. vult.

The following judgments were delivered:—

GARTH, C. J.—I have felt considerable difficulty in arriving at a proper conclusion in this case.

The question we have to decide is not only a very serious one to both parties concerned, but it has also an important bearing upon the relations which exist in this country between the owners and managers of large factories on the one hand, and brokers and others, who are in the habit of advancing money for the carrying on of those factories, on the other.

[His Lordship then stated the facts, and continued with reference to the objection to the stamp borne by the three letters of assignment given to the plaintiffs by Macrae:—]

It may, perhaps, be convenient here that I should deal with a preliminary objection which has been made by the defendants. They contend that these documents, upon which the plaintiffs'

(1) 10 H. L. C., 191. (2) 13 Moore's P. C., 343.

claim depends, and without which it is of course impossible for them to launch their case, are insufficiently stamped, and, consequently, not receivable in evidence. It is said by the defendants that the documents are "mortgages of property not delivered at the time of the mortgage" within the meaning of cl. 10 of sch. i of the Stamp Act, XVIII of 1869.

On the other hand, the plaintiffs contend that, if they are mortgages at all, they are not mortgages of property within the meaning of that clause, because the word "property," as defined by the Act in s. 3, means "property being in British India."

Phear, J., at the trial did not think it necessary to decide this point, and he reserved his judgment upon it until he had determined how he should dispose of the whole case; and, as he decided it eventually in favour of the defendants he did not give any opinion upon the stamp objection. I have great doubt whether it was right to go into the plaintiffs' case at all, or to deal with the documents in question as proved, without first deciding whether or not they were admissible under the provision of the Stamp Act; but at any rate, I think it right to decide the point now, before stating what conclusions I have arrived at upon the merits of the case.

I am of opinion that the proper stamp to be affixed to documents of this description is a stamp of 8 annas.

The documents are, no doubt, in the nature of equitable mortgages, but it cannot be said that the property which is the subject of mortgage exists in British India; and, as an instrument must be stamped at the time it is made, the words "being in British India" would appear to mean being in British India at the time of the making of the instrument. Thus, for instance, if a mortgage were made of property which, at the time of the execution of the deed, was in England, that mortgage would not be subject to stamp duty, although, subsequently and before it took effect, the property might be conveyed into British India (1). The question of stamp must depend on the state of things existing at the time when the mortgage

(1) See *Megji Hansraj* v. *Ramji Joita*, Bom. H. C. Rep., O. C., at p. 180.

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was made; and, as in the case which I have just instanced, it was possible that the property mortgaged might never find its way to British India, so, in the case of the documents in question, it was possible that the property might never have come into existence at all. If this was not the intention of the Legislature, they should have made their meaning more clear.

I am, therefore, of opinion that the stamp affixed to these documents is sufficient, and that, consequently, they are admissible in evidence.

But then comes the main question in the case, how far they are of any force, or validity, as against the defendants' mortgage.

The plaintiffs, on the one hand, insist that, so far as their advances were necessary for the realization of the indigo of the season 1872-73, Mr. Macrae had authority, either expressed or implied, to pledge the indigo to them, and secure those advances. The defendants, on the other hand, say that Mr. Macrae had no such authority.

Undoubtedly, *primâ facie*, the defendants' title being first in order of date, and founded upon the mortgage of the 1st of February, the terms of which are as clear as they can be, ought to prevail; but the plaintiffs put their case in this way:—

In the first place they say, on the strength of Mr. Macrae's own statements, supported by the evidence of other witnesses, that, at the very time when the deed of the 1st of February was in course of execution, it was agreed between him and Monohur Das, who was representing the Mussamuts, that Macrae should borrow from the plaintiffs, or others, any further sums that might be required for the purposes of the concern; and that he should give the lenders the first charge upon the indigo of the season for securing those sums. Monohur Das and other witnesses for the defendants, who were present on the occasion referred to, deny that any such agreement was made; but, although Mr. Macrae's story may not be correct in all particulars—and, of course, after the lapse of several months, it is hardly probable that he should remember exactly what occurred—I have no doubt that some-

thing was said at that time as to further advances being required, and that Monohur Das assented to the same course being pursued in that respect as had been adopted in previous years.

But, assuming that the conversation took place precisely as Mr. Macrae describes it, it is impossible to escape from the conviction that it was an agreement made in direct contravention and defeasance of the deed which Mr. Macrae was at that very moment executing to the Mussamuts. It was, therefore, not admissible in law, as contradicting the express terms of the mortgage (see s. 92 of the Evidence Act); and I consider that the learned Judge in the Court below was perfectly right in rejecting it for that reason.

The only possible way in which it occurred to me at one time that the arrangement might be rendered effectual, was to treat what passed between Mr. Macrae and Monohur Das, not as an agreement, properly so called, but as a direction given by Monohur Das, acting for the mortgagees, to Mr. Macrae, acting as the manager for all parties interested in the production of the indigo, to borrow on behalf of the Mussamuts, as well as others, such further sums as he might find it necessary to raise, and upon the same terms as money had been borrowed for the same purpose in previous years.

But there is great difficulty in construing what actually passed on that occasion, in this way:—In the first place, this construction is not in accordance with Mr. Macrae's own version of what transpired; and I feel strongly that, in a case of this nature, we ought not to assume anything inconsistent with absolute truth, which would have the effect of depriving the Mussamuts of their vested rights. And, again, we have no right to infer, in the absence of evidence, that Monohur Das had authority from the Mussamuts at that time to invest Mr. Macrae with powers directly at variance with the deed which it was his special duty to perfect. He might have been for general purposes their mooktear and man of business, but, as he was present on that occasion for the very purpose of seeing the deed executed, the contents of which had been approved by the Mussamuts, I cannot say that he had

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authority, in the absence of any special powers, and without communication with the Mussamuts, to give Macrae directions, the effect of which, if acted upon, would be to defeat their rights.

On the other hand, I cannot look upon Mr. Macrae himself, as we are asked to do by the plaintiffs, as the agent and manager of the property on behalf of the Mussamuts. It is true that, in one sense, he was acting as manager of the factory, under the direction of the Court, for all parties concerned; but, as regards the mortgage to the Mussamuts, and the rights which they acquired under it, he was acting on behalf of the mortgagors as against the mortgagees, and he had clearly no power to invade those rights, by virtue either of his general authority derived from the Court, or of anything that passed on that occasion between him and Monohur Das.

Failing, then, to establish either a substantive agreement, as put forward by Mr. Macrae, or any directions from the Mussamuts which would justify the pledge of the indigo to the plaintiffs, the case is likened by the plaintiff's Counsel to that of a West India estate, where the consignee, or manager, who has charge of the property for the benefit of all parties concerned, has been held, in a long series of authorities, entitled to charge upon the produce of the property any expenditure or advances which he may have necessarily made for the general benefit of the concern, and to repay himself by that means before any other claims upon the estate have been satisfied. It will be found, however, that the doctrine and principle of these cases do not apply to the present. In the first place, as pointed out by Phear, J., in the Court below, the plaintiffs in this suit are not themselves in the position of consignees or managers of the property which they seek to charge; nor can they legally or equitably place themselves in the position of Mr. Macrae, and treat the advances which they have made for the purposes of the factory as advances made by Mr. Macrae himself. The truth is that both the plaintiffs and defendants have advanced their money on the self-same security. Mr. Macrae has obtained the money from both parties upon the faith of each having a first charge upon the indigo, and the question in this

case, as I pointed out in the first instance, is not between Mr. Macrae, the general manager of the concern, and the concern itself, but between two conflicting sets of mortgagees, each of whom has advanced money upon the same security. The cases, therefore, of West Indian estates, as very fully explained by Phear, J., in the Court below, have no application to the present.

I therefore now come to another, and the principal, ground of contention on behalf of the plaintiffs, as to which I confess I have felt very considerable difficulty.

It is urged by the plaintiffs that, however many obstacles of a technical nature may affect their right in this claim, there is no doubt of the fact that the indigo in question could not have been produced, or manufactured, without the aid of the money which the plaintiffs have advanced. They contend that this was a fact well known to Monohur Das, if not to the defendants themselves; and that Monohur Das was not only aware that the plaintiffs were making these advances, and that they were absolutely necessary for the production of the indigo, but that they were making them upon the usual terms—that is to say, that the advances were to be a first charge upon this indigo itself. It is argued, therefore, that the Mussamut defendants have for their own benefit, and in order to secure the production of the indigo in which they were deeply interested, knowingly allowed the plaintiffs to advance their money upon the faith of having a first charge upon the indigo produced; and that, having done this without making any claim adversely to the plaintiffs, or giving them any notice or information that they objected to the plaintiffs' advances, or that they themselves were entitled to the security upon which the plaintiffs were relying, they ought not in equity and good conscience to be allowed now, having had all the advantage of the plaintiff's money, to turn round and deprive them of their security.

The plaintiffs say that the case comes within the principle which has been acted upon in a great number of cases commencing with *Pickard* v. *Sears* (1), and which was laid down thus by

(1) 6 A. & E., 469.

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Lord Chancellor Campbell in the House of Lords in *Cairncross* v. *Lorimer* (1):—"The doctrine is found, I believe, in the laws of all civilized nations that, if a man, either by words or conduct, has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not lawfully have been done without his consent, and he thereby induces others to do that from which they might otherwise have abstained, he cannot question the legality of the act which he has so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

If a case of this kind could be established by evidence, as clear and strong as that which has been pressed upon us in argument by the plaintiffs' Counsel, I should be very much disposed to decide upon this ground in the plaintiffs' favour; but I am of opinion that, in order to defeat and override an engagement as solemn and distinct as that of the mortgage to the Mussamuts, the evidence that they either themselves, or through their agents, were perfectly aware, not only that the advances were being made by the plaintiffs, but of the amount of those advances and of the terms upon which they were made, should be clear and unmistakeable.

With this view, I have carefully considered the evidence in the present case, and I have reluctantly come to the conclusion that it is by no means sufficient to support the plaintiffs' contention. As regards the Mussamuts themselves, there is no pretence for saying that they were personally made aware either of the necessity for the advances, or of the advances themselves, or of their amounts, or of the terms upon which they were made. On the contrary, at the time when Mr. Macrae says that he made the arrangement with Monohur Das, the Mussamut defendants were having the mortgage deed read over to them, which would certainly convey to their minds that the expenses of the year had been estimated at the sum which they themselves were advancing, *viz.*, Rs. 131,325-15-0, and that, in consideration of the large amount of money which they were entrusting to the concern, they were to have a first charge upon the whole of the indigo produce. They distinctly deny that they were made

(1) 3 Macq. H. L. Ca., 829.

aware of any advances by the plaintiffs, except the Rs. 5,000, which was borrowed for their own necessities; and there is no proof whatever, nor indeed is there any attempt to prove on the part of the plaintiffs, that these ladies were personally made aware of anything further.

But then it is said that Monohur Dass was not only their agent for the purpose of carrying out the mortgage transaction, but that he was their karpardaz, or general man of business for all purposes, and, more particularly, the only person through whom they negotiated with Macrae; and it is also stated (which is perfectly true) that during the whole season these ladies kept two servants in constant attendance at the factory, in order to see how matters were going on there. Now, I quite agree that it has been proved, not only by the plaintiffs' witnesses, but also by Monohur Das, and by the Mussamuts themselves, that Monohur Das did in fact act as their general man of business, and that he was cognizant, at the time when the mortgage was executed, of the intention of Macrae to borrow some further money for the purposes of the factory. He knew also that, in former years, sums had been borrowed from the plaintiffs upon the security of the indigo, though it does not appear that those sums were anything like so large as those borrowed by Mr. Macrae on this occasion; and Bauwarilal himself had always personal knowledge of those loans. Moreover, I fully believe Mr. Macrae, when he says that Monohur Das afterwards proposed that the money borrowed by him from the plaintiffs should pass through the hands of the Mussamuts, in order that he (Monohur Das) should get a commission upon it; and I think it extremely likely that, if that request had been complied with, Monohur Das would have been the means of smoothing the plaintiffs' path, and of preventing this litigation. But I do not find any evidence, nor do I in fact believe, that Monohur Das was aware of the large amount of money which Mr. Macrae was borrowing, or of the actual terms upon which he was obtaining it; and he certainly was not aware of the fact that Macrae was borrowing a large sum, not only for the season 1872-73, but also for the season of 1873-74, upon the security of the indigo which had been mortgaged to the Mussamuts.

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It would, undoubtedly, have been far better, and only consistent with fair and open dealing, that the Mussamuts should have been personally informed of Mr. Macrae's requirements, and that they should at least have had an opportunity either of advancing the money themselves, or of obtaining it from the plaintiffs, or other persons. They would then have known precisely what was borrowed; they might have satisfied themselves of the necessity for borrowing it; and they might also have made their own terms with the lenders.

Giving Mr. Macrae, as I am quite disposed to do, credit for all honesty of purpose, and for endeavouring to do the best he could for the factory, I must say that the inconsiderate manner in which he transacted these loans, without taking any steps to make the Mussamuts aware of them, argued not only a want of business-like qualities, but also of that ordinary prudence and consideration which the manager of such a concern may fairly be expected to possess. Although he himself carried out the mortgage security with the Mussamuts, and was the only person then representing the mortgagors, he states in his evidence, that he does not know whether he ever read over the contents of the instrument, and we find him, according to his own account, making an agreement with Monohur Das, at the very time when the mortgage was entered into, directly at variance with its most important provisions. Having regard to those provisions, it was clearly his duty, as it seems to me, before he ventured to borrow further monies on the security of the indigo produce, or to give any third person such a charge on that produce as would conflict with the Mussamuts' rights, to give those ladies distinct notice of what he was about to do, and to inform them not only of the amounts which he proposed to borrow from time to time, but of the persons from whom, and the terms upon which, he proposed to obtain them; and under no circumstances should he have undertaken to pledge the indigo produce for the requirements of the season of 1873-74.

Strange to say, the conduct of the plaintiffs themselves also appears remarkable for a want of business-like caution. They were perfectly aware that the indigo had been previously mort-

gaged; and yet, without any enquiry or any notice to the mortgagees, they advance no less a sum than Rs. 88,000 upon the faith of Mr. Macrae's statements, and the informal documents upon which they now rest their claim.

I should have no hesitation in finding, as a fact, that the sums advanced by the plaintiffs were, in great measure, at least *bonâ fide* required for the purposes for the factory. Mr. Macrae was not cross-examined with regard to the necessity for the advances, nor as to the items of the plaintiffs' account, nor as to the due expenditure of the sums advanced. It would certainly have been more satisfactory, if, in a case of this nature and importance, instead of being examined under a commission, he had himself appeared in Court, and produced his books, and frankly tendered himself and them for thorough investigation; but, as he was not advised to take this course, and as he was not cross-examined with regard to his expenditure, or the necessity which existed for borrowing the money, I think the defendants were not justified in suggesting that the money was either not required, or that it was improperly expended.

But, when the case of the plaintiffs is put upon this ground, that they acted with proper caution in making these advances, and that the defendants, with full knowledge of all the circumstances, stood by and allowed the plaintiffs thus to advance their money upon the faith of a security which they themselves possessed, and upon which they intended to insist,—I must say that I think in that respect the case of the plaintiffs is not proved.

However much, therefore, I may regret the result (because I quite believe that the plaintiffs acted in perfect good faith, and that the defendants have reaped the benefits of the money which the plaintiffs have been induced to advance), I am satisfied that the conclusion which we have arrived at is the only one consistent with equity and good conscience.

The claim which the Mussamut defendants make to the property in question is undoubtedly well-founded in point of priority; and I think that, upon neither of the grounds contended for by the plaintiffs, can their title to it be legally displaced.

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The appeal will, therefore, be dismissed with costs on scale No. 2.

MACPHERSON, J.— I also think that this appeal must be dismissed.

The matter in dispute is a simple question between two mortgagees as to which of them is to have priority. If the plaintiffs could make use of the arrangement which Macrae says was made at the time of the execution of the mortgage deed, of course they would be entitled to a decree. But they clearly can make no use of it; for, if any such arrangement or understanding then existed between the parties, it was essential that it should be embodied, or provided for, in the mortgage deed.

Then, again I think it impossible to say that the plaintiffs have proved that the advances were made by them with the knowledge and acquiescence of the defendants (the Mussamuts). Nothing is proved on this issue against them personally; and as regards Monohur Das, the evidence is vague, and not such as it might have been, had Macrae taken the commonest precautions, for there ought to have been no difficulty in bringing home to Monohur Das, at any rate, express notice and knowledge of all the details of what went on between Macrae and the plaintiffs. Even as to the bill for Rs. 5,000, which Monohur Das certainly knew was drawn against Moran and Co., there is nothing to prove that he knew the terms on which it was drawn, and there is nothing to show his knowledge of any other particular advance made by the plaintiffs.

The plaintiffs failing to prove knowledge and acquiescence on the part of the defendants (the Mussamuts), there is nothing, as it seems to me, in the contention that the matter can be treated as in the nature of a case of salvage. The defendants (the Mussamuts) had a first mortgage, as security for a large sum advanced for the season's manufacture, and no reference was made to them before the further advances were taken from the plaintiffs. I am wholly at a loss to comprehend on what principle of equity they, who were present on the spot, and might at any time have been appealed to, can be held liable to give priority to the plaintiffs who were strangers, brought

over their heads, without their consent, by the mortgagor's manager. I say this even on the supposition that the amount now claimed by the plaintiffs was absolutely necessary in order to enable the indigo to be manufactured, and that no indigo could have been made without it. Of course, the position would have been wholly different, had knowledge and acquiescence on the part of the defendants (the Mussamuts) been proved.

The plaintiffs, no doubt, had, in previous years, made similar advances, and had been allowed a first charge on the indigo; but, on this occasion, they knew that Banwarilal, the former mortgagee, had died, and that his representatives were mortgagees of the factory and the season's indigo. Knowing that there were new mortgagees, ordinary prudence ought to have suggested the necessity of procuring their assent before making the advances.

I agree in the opinion that only an eight-anna stamp was required for the agreement between Macrae and the plaintiffs.

I regret the conclusion at which we are compelled to arrive, because it is clear that the plaintiffs acted perfectly honestly throughout, and because I have very little doubt that Macrae also acted honestly, and that his story is substantially true, although it is impossible to say that it is proved to be so. The looseness of Mr. Macrae's mode of doing business is quite wonderful, and it is remarkable that the plaintiffs should have been ready to lend their money on such slender security.

Appeal dismissed.

Attorneys for the appellants: Messrs. *Berners, Sanderson,* and *Upton.*

Attorneys for the respondents: Mr. *Farr* and Baboo *Nemy Churn Bose.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

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ABUL MUNSOOR (ONE OF THE DEFENDANTS) *v.* ABDOOL HAMID *alias* SABHAN MIAH (PLAINTIFF).*

Limitation—Act IX of 1871, *sch. ii, cl.* 14—*Suit to set aside a Sale—Purchase of Decree by Joint-debtor.*

M sold to *S* her rights under a decree for mesne profits which she had obtained against *A* and two other persons, and *S* thereupon proceeded to execute the decree against *A's* property, and that property was sold in execution of the decree purchased by *S*, and was purchased by *B*: but in a suit brought by *A* for a declaration that *S* was not the real purchaser, the Court found that *S* had in fact purchased the decree benami for *A's* two joint-debtors, and that consequently he had no right to execute it against the property of *A*. In a suit brought by *A* against *B* in 1874 for the purpose of recovering the property, *Held*, that the purchase of the benefit of the decree by *A's* joint-debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable, and the sale under it binding on *A*. The suit, therefore, was in effect a suit to set aside a sale under a decree within the meaning of cl. 14 of sch. ii of Act IX of 1871, and inasmuch as it was not brought within one year from the date of the sale, was barred.

THE facts of this case were as follows:—

A certain Mrs. Munro obtained a decree for mesne profits against three persons, the present plaintiff Abdool Hamid, and two Hindus, Guru Gobind and Bykunt Nath. In the year 1268 (1861), Mrs. Munro sold her rights under this decree to one Shitul Chunder, and Shitul Chunder then took proceedings to execute the decree against the estate of Abdool Hamid. Abdool Hamid objected to this, on the ground that Shitul Chunder had purchased the decree, not for himself, but *benami* for his (Abdool Hamid's) two other joint-debtors, and he then brought a suit for the purpose of obtaining a declaration to the effect that his co-debtors were the real purchasers of the decree, and conse-

* Regular Appeal, No. 152 of 1875, against a decree of the Judge of Zilla Dacca, dated the 12th of February 1875.

quently that according to a well established rule of law the judgment-debt was thus satisfied. In that suit he obtained a decree on the 16th March 1872. It was found by the Court, that Shitul Chunder had in fact purchased the decree for the two other joint-debtors, and consequently that Shitul Chunder had no right to execute the decree against Abdool Hamid's property.

Previously, however, to the institution of that suit, an order for execution under the decree had been obtained from the Court by Shitul Chunder against Abdool Hamid's property; and under that execution, the property, which is the subject of the present suit, was sold, and Abul Munsoor (defendant No. 2) became the purchaser. This sale took place on the 19th of September 1870. On the 12th May 1874, Abdool Hamid, alleging that the sale having been held in execution of a decree which was at the time of sale inoperative, was null and void, brought this suit against Abul Munsoor and others for the purpose of recovering possession of the property thus sold.

The only defendant who appeared was Abul Munsoor, the appellant. His main contentions were, that as the property had come into his possession by a sale in due course of law, and no objection had been taken by the plaintiff under s. 257, Act VIII of 1859, the sale was final, and the suit not maintainable; that the suit was one to set aside a sale, and, not having been brought within one year from the date of the sale, was barred by the law of limitation, and that the suit was moreover barred by s. 7, Act VIII of 1859. The Judge held that the suit was not one to set aside the sale, which would have been unnecessary, and therefore the limitation of one year was not applicable, and that the suit was not barred by s. 7. He therefore gave a decree in favour of the plaintiff, from which the defendant appealed to the High Court.

Mr. *M. Ghose* (Mr. *L. Ghose* with him) contended that under the provisions of s. 11, Act XXIII of 1861, the suit would not lie; that the bringing of the suit amounted to a splitting of the cause of action within s. 7, Act VIII of 1859; and that the property having passed to the defendant by operation of law, the suit was not maintainable, and cited

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Mariott v. *Hampton* (1), *Nojabut Ali Chowdhry* v. *Busseeroollah Chowdhry* (2), *Radhagobind Shaha* v. *Brojender Coomar Roy Chowdhry* (3) and *Chunder Kant Surma* v. *Bissessur Surma* (4). Even if such a suit does lie, in this case the plaintiff's suit is clearly barred by limitation. Act IX of 1871, sched. ii, art. 14, provides that a suit to set aside a sale in execution of a decree must be brought within a year of the sale. Though the plaintiff chooses to call the suit one for recovery of possession, it is in effect a suit to set aside the sale, and should have been brought within a year from the date thereof—*Ram Kant Chowdhry* v. *Kalee Mohun Mookerjee* (5). The following cases were also cited: *Krishnaji Vishvanath Josi* v. *Mukund Chivanshet* (6). A party bound by proceedings must, in order to set them aside, bring a suit within one year—*Brijo Kishore Nag* v. *Ram Dyal Bhadra* (7).

The learned Counsel was stopped by the Court who called upon the pleader for the respondents on the point of limitation.

Baboo *Sreenath Doss* for the respondents.—The only remedy the plaintiff has is to sue in a regular suit. The purchase of a decree by one of the debtors operates as a satisfaction of the decree, which cannot, after such satisfaction, be legally executed—*In the matter of Digamburee Dabee* (8). If in fact there was no live decree which could be executed, anything done under it would be void *ab initio*. [GARTH, C. J.—But a decree does not lose any of its virtues, because it has been paid, and a sale in execution of such decree will be void.] [GARTH, C.J.—Not void, but only voidable]. If the sale had been made under a decree in existence at the time, then only would the principle laid down in *Jan Ali* v. *Jan Ali Chowdhry* (9) apply. If from a time previous to sale there was not a decree, the one year's limitation would not apply—*Badree*

(1) 2 Smith's L. C., 405.
(2) 11 B. L. R., 42.
(3) 7 W. R., 372
(4) 7 W. R., 312.
(5) 22 W. R., 84.
(6) 2 Bom. H. C. Rep., 18.
(7) 21 W. R., 133.
(8) B. L. R., Sup. Vol., 938.
(9) 1 B. L. R., A. C., 56.

v. *Lokeman* (1). Limitation of one year applies only to set aside sales on account of irregularity and not on account of fraud—*Kishen Bullub Mahatab* v. *Roghoo Nundun Thakoor* (2).

Mr. *M. Ghose* in reply.

Cur. adv. vult.

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The judgment of the Court was delivered by

GARTH, C.J.—In this appeal it is only necessary for us to decide one of the points which have been taken by the defendants, the appellants, and that point is upon the plea of limitation.

(After stating the facts as above, the learned Chief Justice proceeded as follows:—

The plaintiff relies upon the same ground as that taken in his former suit, *viz.*, that Shitul Chunder's purchase was made on behalf of his (the plaintiff's) co-debtors; and that the judgment-debt was consequently extinguished. He contends, therefore, that the subsequent sale was void as against the plaintiff.

One objection to this suit, which was made in the Court below, and is now made by the defendant, the appellant, is, that it is brought to set aside a sale in execution of a decree of a Civil Court within the meaning of cl. 14 of the 2nd schedule of the present Limitation Act, and this point was argued before us yesterday.

There are other questions in the case, and many circumstances which we should have had to take into consideration, if it had been necessary to decide the suit upon its merits. But the facts already mentioned are sufficient to raise the question of limitation, and that question we think ought to be decided in favour of the appellant.

It has been argued by the plaintiff's pleader, that this is not a suit for the purpose of setting aside the sale by which the property passed to defendant No. 2, but a suit to recover possession of that property, and that, assuming the purchase of the decree by Shitul Chunder to have been made for the plaintiff's co-debtors, the decree itself is no longer in force, and

(1) 4 Agra H. C. Rep., 89. (2) 6 W. R., 305.

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the sale which took place under it was absolutely null and void. It is obvious, however, that this is not a correct view of the law. The purchase of the benefit of the decree by the plaintiff's joint-debtors could not affect the decree itself, although it had the legal effect of satisfying the judgment-debt which the decree created. There is no suggestion that the decree was not in itself a just one; and the order made by the Court in the execution of that decree and the sale which took place under that order were both binding upon the plaintiff until proper steps were taken to reverse them, and the title of the defendant who purchased under that sale was also a perfectly good title, until the sale was set aside in due course of law. The mistake into which the learned Judge has fallen in the Court below is this, that he supposes the sale which took place under a valid order of the Court and under a decree which is at this moment effectual and undisputed, is *ipso facto* void by reason of the judgment-debt having been satisfied. The sale was not void, but only voidable, and whatever may be the frame or language of the plaint in the present suit, its real object and purpose is to avoid or set aside the sale; because that is the only means by which the defendant's title can be defeated, and the plaintiff restored to his right of possession.

We have been referred by the plaintiff's pleader to a case, *Kishen Bullub Mahatab* v. *Rughoo Nundun Thakoor* (1), but that is a totally different case from the present, and will be found not to support the defendant's contention. The plaintiff there had obtained a decree against Pearee Lall Mahta for certain sums of money. Pearee Lall Mahta (the judgment-debtor) then died, and after his death, his wife, for the purpose of preventing her husband's property being taken in execution, made a sham sale of it in the first instance to a third person, and a collusive suit followed, in which a decree was fraudulently obtained, and the property sold under that decree to another party. In this state of things, the plaintiff (the execution-creditor) brought a suit to set aside the collusive sale and subsequent proceedings, upon the ground that they were all one

(1) 6 W. R., 305.

entire fraud, concocted for the purpose of defeating his judgment. It is obvious that this was not a suit to set aside a sale under a decree within the meaning of cl. 14 of the Act.

Another case in the Agra High Court Reports, decided by Morgan, C. J., and Ross, J., was also referred to, in which the point as to the one year's limitation seems also to have been taken and overruled. That case is very imperfectly reported, and the ground of the decision seems rather to have been that the one year's limitation did not apply, because the defendant had been guilty of some fraud which prevented the rule of limitation from applying. Whatever may be the correct solution of that case, we certainly do not consider it an authority by which we ought to be influenced in our present judgment.

The case cited by Mr. Ghose—of *Ram Kant Chowdhry* v. *Kalee Mohun Mookerjee* (1) decided by Kemp and Birch, JJ., is a distinct authority in this Court in favour of the view we take of this question.

The appeal will consequently be allowed with costs. The decree of the lower Court will be reversed, and the plaintiff's suit will be dismissed with costs of the Court below.

Appeal allowed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

IN THE MATTER OF THE LAND ACQUISITION ACT (X OF 1870).

1876 *Sept.* 4.

PREMCHAND BURRAL AND ANOTHER *v.* THE COLLECTOR OF CALCUTTA.

Land Acquisition Act (X of 1870)—Principle on which Compensation is to be given.

Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood without any special reference to the uses to which it may be

(1) 22 W. R., 84.

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applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. In accordance with this principle the question for inquiry is, what is the market value of the property, not according to its present disposition, but laid out in the most lucrative way in which the owners could dispose of it.

APPEAL under the Land Acquisition Act (X of 1870) from the decision of the Judge of the 24-Parganas, who was the Judge appointed to hear cases under the Act.

The case was sent up to the Judge by the Collector of Calcutta as he was not able to agree with the owners as to the amount of compensation to be paid for 2 bigahs 15 cottahs of land in Bow Bazar Street in Calcutta, which had been taken up by the Government. The property was a portion of a block which had been purchased by the owners Premchand Burral and Nobinchand Burral in July 1875 for Rs. 42,000, and they had, since the purchase, spent Rs. 3,000 on it for repairs to a demi upper-roomed house and other buildings on the land. The portion with which this appeal is concerned was the south portion of the part facing Bow Bazar Street, and having a frontage of about 127 feet, and contained all the buildings, which were admittedly valued at Rs. 15,590. The owners claimed Rs. 800 per cottah for the land alone exclusive of the buildings, amounting to Rs. 44,000. They claimed this as being the selling price of land in the neighbourhood, and they brought forward several instances of land in the neighbourhood having been sold at Rs. 800 per cottah and upwards.

The income of the portion, the subject of appeal, was stated by the owners to be Rs. 129-8, but they also stated that this did not represent the income fairly derivable from it; they showed that by dividing the property differently according to a plan they put in, and by improvements in the buildings, the receipts would have been but for the acquisition materially increased so as to amount to Rs. 172-7 per month or Rs. 2,069-4 a year. The Collector found that there was no instance of so large a block of land being sold at the rate of Rs. 1,000 per cottah; that there was no analogy between small plots and large blocks in this respect; and that the true test of the value of the latter was the income derivable from them. He took the

owners' estimated income of Rs. 172-7 per month, and allowed 16 years' purchase, deducting 12 per cent. on account of rates, repairs, and collection charges, which came to Rs. 29,135. This, together with the 15 per cent. allowed by s. 42 of the Act, was the amount of compensation tendered by the Collector amounting to Rs. 33,505-4.

The owners refusing to accept this amount the case was referred to the Judge.

The Judge, after stating the cases brought forward on both sides, continued: "The conclusions deducible from the foregoing are, that for small blocks with a frontage only it may be said that Rs. 1,000 per cottah is by no means high. Omitting No. 1 and 2 Wellington Street where the price was extravagant, and Beadon Square, which was a large block valued by arbitrators in 1867, all the other instances brought forward by the Burrals shew Rs. 800 to be the lowest, and Rs. 1,867 the highest, price per cottah, but with the exception of Chunee Lall Doss' purchases of 2 and 3 College Street, there were circumstances in all the cases tending to raise the price. It must, however, be noticed that 16 years' purchase of the gross income (without deducting anything for rates and taxes or depreciation) is more than the average price paid." The Judge found that the land alone represented Rs. 26,410 out of Rs. 42,000 paid by the Burrals for 7½ bigahs at the rate of Rs. 170 per cottah, but that the portion now acquired was on the whole more valuable than the remainder, and that Rs. 15,602 was a fair price at which to assess the land. He arrived at this amount on a calculation of the yearly income at Rs. 2-1-9 per cottah, and assuming that the whole would be fully built upon. Adding the value of the buildings, Rs. 15,590, the sum he awarded was Rs. 31,927.

The owners appealed from this decision to the High Court.

Mr. *Jackson* and Mr. *Macrae* for the appellants.

The *Advocate-General*, offg. (Mr. *Paul*) and the *Standing Counsel* (Mr. *Kennedy*) for the respondent.

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The arguments sufficiently appear in the judgment of the Court, which was delivered by

GARTH, C. J.—(MACPHERSON, J., concurring).—In this case I think that the learned Judge in the Court below has not done full justice to the owners of the property. He has substantially adopted the valuation of the Collector; and has made his award upon the supposition that the fair mode of estimating the price of the property in the market is to capitalize its present rental at so many years' purchase.

I consider that, having regard to the evidence on both sides, this is not a fair way of arriving at the market value. Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood, without any special reference to the uses to which it may be applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. Of course, if it can be satisfactorily shown that the purposes to which the land is applied are as productive as any other to which it is applicable, or that the price given by the owners is its full market value, it would be very just to assess the compensation upon that basis. But in this case I find no evidence to that effect. On the contrary, it would appear that a considerable portion of the land is virtually unoccupied, and that the owners had previously prepared a plan for laying out the whole area to much greater advantage; and, moreover, it is in evidence that the claimants bought the property at a lower rate, in consequence of the title having been seriously questioned by two professional gentlemen. We have therefore to consider, having regard to the evidence on both sides, what is a fair sum to award to the claimant in respect of this land; but, before we enter upon this question, there is a preliminary point which it is desirable that we should at once dispose of.

Mr. Jackson insists that his clients are entitled to the agreed price of the buildings, as they stand, in addition to the fair value of the land itself. But I do not see how, upon any prin-

ciple of compensation which has been suggested in argument, his claim in this respect can be supported; and I have tried in vain to discover why the learned Judge who tried the case in the Court below, or the assessors, thought it right to allow the owners this sum.

If you estimate the value of the property upon its present rental, and capitalize that rental into so many years' purchase, you are, in fact, taking into consideration the value of the buildings; and if you award the sum thus arrived at to the owners, you are, in fact, paying them the value of the buildings; so that, besides giving them the value of the buildings as they stand, you would be paying them for the buildings twice over.

But, then, suppose you proceed upon another principle. Instead of estimating the value of the property according to its present uses and its present rental, suppose you ascertain what it would be worth, if occupied in a different way, as for a bazar, or for shops, or other buildings of a lucrative character. Estimating it in this way, you must necessarily take into consideration that the present buildings must all be pulled down, because, until they are pulled down, the land could not be applied to its new and more advantageous uses; and all that the owners could possibly obtain, or ask, for the buildings, under such circumstances, would be the price of the old materials.

Then, there is again a third principle of valuation, in which the same result would follow as in the first mode of estimating the value; and that is to suppose the buildings to remain standing, and to estimate them at a capitalized rental value, while you estimate the remainder of the property at its market value, treating it as unoccupied land. This principle of valuation would prove anything but favourable to the owners, because they could not expect to get for Mrs. Romaine's house, with a bazar or shops built round it, as much rent as they have hitherto obtained; nor could they lay out the frontage land to advantage, with the small buildings which now occupy a portion of it obstructing the full range of the street. But if this principle were adopted, the owners could not then be entitled to the capitalized rental of the buildings as well as

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to their value as they stand, because they would in this way be again receiving the value of the buildings twice over.

This point being disposed of, it seems clear that the fairest and most favourable principle of compensation to the owners is that upon which the weight of the argument on both sides has been bestowed, *viz.*, what is the market value of the property not according to its present disposition, but laid out in the most lucrative and advantageous way in which the owners could dispose of it.

And, after full consideration, it appears to me that the fair amount of compensation to award to the owners upon this principle is Rs. 39,500.

Three of the claimant's witnesses—one of them Shambhu Nath Rai, a large landowner in Calcutta, who, it seems, has had extensive dealings in house property—state the value of the claimants' land, back and front, at Rs. 800 a cottah. Now, having regard to the large area of back land, as compared with the frontage, and also to the fact that 15 cottahs are occupied by the tank, Rs. 800 per cottah seems rather a high average for the land all round. The frontage is, no doubt, valuable; and, making all due allowance for some of the properties mentioned by the witnesses commanding a higher price in consequence of the purchaser's requiring them for special purposes, I cannot estimate the frontage at less than Rs. 1,000 a cottah. Making the same allowance then which it is generally fair to do in cases of this nature for a little over-statement on the part of the claimants' witnesses, Rs. 700 a cottah would, probably, be a fair price for the entire area. This would give for the 55 cottahs Rs. 38,500. If, instead of calculating the whole area together, we were to estimate the front land (say 15 cottahs) at Rs. 1,000, and the back land at Rs. 600 per cottah, the result would be very nearly the same, say—

15 cottahs at Rs. 1,000	...	15,000	0	0
40 cottahs at Rs. 600	...	24,000	0	0
	Rs.	39,000	0	0

Or, if we were to adopt the evidence given for the Government, their first witness says that he purchased 32 and 33 Bow Bazar,

occupying an area very nearly of the same extent as the claimant's (between 54 and 55 cottahs) for Rs. 38,000. He gave this sum with the building in very bad repair—a fact which we all know depreciates, sometimes unduly, the value of house property. Taking then the claimant's property of equal extent to be worth an equal sum, the result would be much the same as the sum which we propose to allow. Then, if to this sum we add another Rs. 1,000 for severance of the portion adjoining Champatollah Lane, we consider the plaintiff will be properly compensated. The damage caused by severance is not considerable; the two portions of the property have been, in fact, divided by a wall, and the severed portion still retains a frontage upon Champatollah Lane.

We therefore set aside the award of the Judge, and fix the amount of compensation at Rs. 39,500, to which the Collector will of course have to add the statutory 15 per cent. The owners will have the costs of this appeal, and the costs to which they are entitled in the Court below will be calculated according to the rule adopted by Mr. Beaufort,—that is to say, the costs which would be allowed in a regular suit. The owners are also entitled to interest at 6 per cent. upon the sum which we award for compensation from the time when the Government took possession of the property.

Decree varied.

Attorney for the appellants: Mr. *Carruthers.*

Attorney for the respondent: *The Government Solicitor,* Mr. *Sanderson.*

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

1876
Sept. 11.

IN THE MATTER OF JUGGUT CHUNDER CHUCKERBUTTY.*

Criminal Procedure Code (Act X of 1872), ss. 294 and 297—Revision—Power of High Court—"Material Error."

In a case of apprehended breach of peace, the Magistrate bounded over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

Per MARKBY, J.—Ss. 294 and 297, Act X of 1872, do not debar the High Court from interfering where in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all or has exercised his discretion in a manner wholly unreasonable.

Per MITTER, J.—Under s. 297, the High Court has the power of interfering with judgments, sentences, or orders of Court subordinate to it, if there has been a material error in any judicial proceeding of such Courts, meaning thereby any error appearing on the face of a judicial proceeding resulting in an unjust order.

APPLICATION under s. 297 of the Criminal Procedure Code (Act X of 1872).

The petitioner in this case had been bound over by the Joint Magistrate of Backergunge for an apprehended breach of the peace in a recognizance of Rs. 10,000 with two sureties for Rs. 5,000 each. A dispute had existed between the petitioner and one Baroda Chuckerbutty on the one hand, and one Sabir Myan on the other in respect of a plot of land. It was found by the Joint Magistrate that until Aghran last all the ryots, except a small minority, had paid the rent to Sabir Myan, but in that month, in consequence of his oppression, several of them went over to Baroda Chuckerbutty. Up to that time there had been much litigation between the parties, but no attempt to break

* Criminal Motion, No. 232 of 1876, against the order of the Joint Magistrate, dated 22nd February 1876, and against the order of the Sessions Judge of Backergunge, dated the 7th June 1876.

the peace. A breach of the peace being, however, then apprehended, Police were stationed near the land in dispute, which from the Magistrate's judgment, appeared to have been effectual in preventing any disturbance. The Magistrate, nevertheless, thought it desirable to take some further security. Summonses were accordingly issued against four persons, including the petitioner, Baroda, Sabir, and two of their respective servants. After enquiry the Joint Magistrate bound over the principals in recognizances of Rs. 10,000 each, with two sureties of 5,000 each, and the servants in small sums.

An application was made to the Sessions Judge, among others, on the ground that the recognizance was excessive. In dealing with this objection, the Judge used the following words:—"Lastly, it is urged that the amount of the recognizance is excessive; here I quite agree with the petitioners, and, if I could only have seen my way, I should certainly have referred the case to the High Court for this reason alone; but this is a point on which the High Court decline to interfere."

The petitioner, thereupon, preferred the present application to the High Court.

Baboo *Ashootosh Dhur* for the petitioner.

No one appeared for the Crown.

The following judgments were delivered:—

MARKBY, J. (after stating the facts as above, continued):—The Sessions Judge is quite right in supposing that this Court would not ordinarily interfere with the discretion of Magistrates, as to the amount of security to be taken in cases of this kind. The Magistrate is in a much better position than this Court for judging what would be the proper amount of security, which must vary with the danger to be apprehended and, the means of the parties. But the Magistrate cannot make an order, that is altogether unreasonable. Here the Magistrate, although there has been as yet no breach of the peace, and apparently no very strong determination to resort to violence, has required the parties to enter into bonds amount-

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ing altogether to upwards of Rs. 60,000. The parties do not appear to be wealthy; and had the security ordered been really required, in all probability it could not have been furnished. We find, however, that one of the parties, who has been accepted as surety for Rs. 5,000, is described as a *kotwal* and another as a *mookhtear*, and all the bonds were executed on the very day the order was made. It would thus appear as if the amounts mentioned in the bond are merely nominal, and that no real security to that extent was required.

I consider that in this case, the Joint Magistrate has not done that which the law requires. Either he has wholly failed to exercise the discretion which the law requires him to exercise in taking security for good behaviour, or, if he has exercised it at all, he has exercised it in a manner which is altogether unreasonable. Whichever be the case, I do not think we ought to allow such an order to stand.

No one appears on behalf of Government to support the order, and the Magistrate has offered us no explanation. We have nevertheless thought it necessary to consider whether this is a case in which we ought to interfere under the powers of superintendence and revision over the subordinate Courts conferred upon the High Court by Chapter XXII of the Code of Criminal Procedure. It has been held, notwithstanding the very general words of ss. 294 and 297, that this Court ought not, in the exercise of these powers, to go into the evidence and examine the conclusions of the Court below upon the facts. I desire to adhere to those decisions. It seems to me necessary to do so, as otherwise an appeal would virtually lie against every decision of the subordinate Courts, which was clearly not intended by the Legislature. But, nevertheless, I do not think that we are excluded from interference where in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all, or has exercised his discretion in a manner wholly unreasonable. I think that we have the power and ought to interfere in such cases, just as we have the power, and ought to interfere where a Magistrate has been guilty of misconduct. I did not myself intend to say anything contrary to this in *In*

the matter of Debichurn Biswas (1). Nor do I think that the decision in *In the matter of Belilios* (2) lays down anything contrary to this view. No doubt the language of Pontifex, J. in that case and my own language in the other case might be pressed to the extent of confining this Court when exercising powers of revision strictly to errors in law. As a general rule, that is so. Cases of misconduct or utter want of discretion are rare and exceptional, and were not, I think, contemplated when those decisions were given. I am of opinion that this Court, when exercising its powers of revision, is justified in dealing with such cases, and that we may do this without in any way interfering with the rule that this Court will accept the conclusions of the Court below upon the evidence in the case.

Upon the ground that it appears upon reading the proceedings that the Joint Magistrate has either exercised no discretion at all in fixing the amount of security, or that he has exercised his discretion unreasonably, and that the Magistrate has given us no explanation, I think we ought to set aside his order.

MITTER, J.—I am also of opinion that we ought to set aside the order of the Joint Magistrate in this case. Under s. 297 this Court has the power of interfering with judgments, sentences or orders of Courts subordinate to it, if there has been a "material error in any judicial proceeding" of such Courts. These words, it seems to me, mean any error appearing on the face of a judicial proceeding resulting in an unjust order. For the reasons given by my learned colleague, there appears, on the face of the proceeding of the Court below, such a material error as would warrant this Court in setting aside the order passed by it.

Order quashed.

(1) 20 W. R., Cr., 40. (2) 12 B. L. R., 249.

APPELLATE CIVIL.

Before Mr. Justice Ainslie and Mr. Justice Birch.

1876
May 12.

RUNGLALL MISSER (PLAINTIFF) *v.* TOKHUN MISSER AND ANOTHER (DEFENDANTS).*

Act VIII of 1859, *s.* 119—*Ex parte Decree—Rehearing granted after expiration of time limited for application.*

The plaintiff obtained an *ex parte* decree on the 5th July 1873, of which he took out execution on the 9th August. On the 11th of November, the defendant applied for and obtained a rehearing under s. 119, Act VIII of 1859. On the rehearing, his suit was dismissed by both the lower Courts on the merits. *Held*, on a special appeal to the High Court, that, although s. 119 provides that an order for rehearing shall be final, it is final only in the sense that it is not by itself open to appeal, and that the plaintiff was not precluded by that section from raising the objection that the order for rehearing was made after the time limited therein, and therefore ought to be set aside as made without jurisdiction.

SUIT for possession of land, in which the plaintiff obtained an *ex parte* decree on the 5th of July 1873, in execution of which he obtained possession, the execution being taken out on the 9th August. On the 11th November 1873, the defendants made an application under s. 119, Act VIII of 1859, to set aside the *ex parte* decree and for a rehearing. This application was refused by the Munsif, but on appeal his decision was reversed by the Judge, who, without determining whether the application was within time, held that the defendants were entitled to a rehearing.

On the rehearing before the Munsif, the plaintiff failed to make out his case, and his suit was dismissed on the merits, the order being confirmed by the Judge on appeal. The plaintiff, thereupon preferred this special appeal to the High Court, on the ground that the application for rehearing under s. 119

Special Appeal, No. 2049 of 1875 against a decree of the Subordinate Judge of Zilla Gya, dated the 17th of August 1875, affirming a decree of the Munsif of Aurangabad, dated the 3rd of October 1874.

having been presented after the expiry of the 30 days therein limited, the Courts below were in error in granting the application and hearing the case on the merits. He also appealed on the facts of the case.

Baboo *Abinash Chunder Banerjee* for the appellant.

Mr. *Younan* for the respondents.

The contentions and cases cited appear in the judgment of the Court, which was delivered by

AINSLIE, J. (who, after stating the facts, continued):—The points which have been urged before us are, that, whereas s. 119 provides a definite limit of time, beyond which an application for a rehearing shall not be entertained by the Court, the order of the Judge admitting the application, and all the proceedings following thereon, have been done without sanction of law; and that in this appeal from the decree, the appellant has a right to question every order of the subordinate Courts leading up to the decree objected to.

S. 119 of the Code of Civil Procedure says, that, in all cases in which the Court shall pass an order under this section for setting aside a judgment, the order shall be final. But it is contended on the strength of a Full Bench judgment in *Bhyrub Chunder Surmah Chowdhry* v. *Madhubram Surmah* (1), that the word "final" does not mean final absolutely, but final for the time; that the order by itself shall not be open to appeal; but that whenever the case is opened by an appeal from the decree, that order, as well as every other interlocutory order, may form the subject of appeal.

There can be no doubt that, if a case under s. 119 cannot be distinguished in principle from a case under s. 378, we ought to follow the ruling of the Full Bench. Though we are not constrained by a positive rule of the Court, we ought not to refuse to be guided by a decision on a matter which appears to us to be strictly analogous; it is for the respondent to satisfy us that the supposed analogy does not really exist, and that he has failed to do.

(1) 11 B. L. R., 423.

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Independently of this, there is a reported case exactly in point —*Bimola Soonduree Dossee* v. *Kalee Kishen Mojoomdar* (1)— decided by Jackson and McDonell, JJ., and the view taken by Jackson, J., is this, that a Court acting under s. 119 has jurisdiction to act under the particular conditions specified by the section, but unless an application can be shown to be within those conditions, the Court has no jurisdiction whatever to entertain it.

After referring to that portion of the section which I have read above, he says:—" Therefore if it appears that the Court had passed an order otherwise than under this section, there would be no finality, and it has been held in a matter very much analogous to this, *viz.*, where an application to review a judgment has been admitted, and where a decision afterwards takes place on rehearing, and that decision comes to the lower Appellate Court on appeal, that the lower Appellate Court is competent to look into the question whether the admission of the review has been in accordance with the restrictions imposed by the law."

On the face of these proceedings, it is manifest that s. 119, which strictly limits the period for making an application for rehearing to thirty days, to be computed from definite starting points, absolutely barred the hearing of the application by the first or any other Court.

It has been argued that the plaintiff had a remedy by motion in this Court under s. 15 of the Charter Act. It may be conceded that he had a remedy, but no authority has been shown to us for the proposition that, if a man has two remedies, and does not choose to take the one, he shall forfeit the other. If the plaintiff has a right to appeal against this order, the fact that he had a right to question it by motion under s. 15 cannot take away the former right. It was also urged that it is a matter of discretion with the Court to give or withhold from the plaintiff the advantage of the limitation prescribed in s. 119. But if this is a point that he may fairly and properly

(1) 22 W. R., 5. See also *Radha Binode Chowdhry* v. *Juggut Shurnokar*, 6 W. R., 300; *Toolsee Dossee* v. *Doorga Churn Paul*, 13 R. W. 175; and *Keshavram* v. *Ramchandra Trimbuk*, 8 Bom. H. C. Rep., A. C., 44.

raise in special appeal, it is not a matter of discretion with the Court. Our judgment is claimed on this point, and we can neither refuse to decide it in favor of the plaintiff, nor having decided it in his favor, can we refuse to give him the benefit of the decision.

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The result is, that the order made for the rehearing of the case, and dated the 25th of June 1874, and all the proceedings subsequent thereto, must be quashed, and the whole of the costs of these proceedings must be paid by the respondents.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Mitter.

IN THE MATTER OF PURSOORAM BOROOAH, PETITIONER.*

1876 *June* 10.

Powers of Magistrates—Summary Jurisdictiom—Transfer—Criminal Procedure Code (Act X of 1872), *ss.* 56 *&* 222—*Furlough.*

The petitioner had been convicted by Mr. Carnegy, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction, under s. 222 of Act X of 1872. This Officer was, in the year 1872, in charge of the Jorehaut Division in the District of Seebsaugor, "with first-class powers and powers under s. 222" of the Act. In 1874 he proceeded on furlough to England, and, on his return in 1875, was posted to the District of Kamroop, and invested with the powers of a Magistrate of the first-class.

Held, that s. 56 of Act X of 1859, did not apply, and that Mr. Carnegy had no summary jurisdiction in Kamroop.

Per MARKBY, J., on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegy, it had in effect "directed," within the meaning of s. 56, Act X of 1872, that he should not exercise that jurisdiction anywhere but in Seebsaugor.

Per MITTER, J., on the ground, that the office to which Mr. Carnegy was appointed in Kamroop was not equal to or higher than that which he had held in Seebsaugor.

Quære per MARKBY, J., whether the posting of Mr. Carnegy to Kamroop after his return from furlough, was a transfer from Seebsaugor within the meaning of s. 56 of Act X of 1872.

* Criminal Motion, No. 92 of 1876, against an order of the Assistant Judicial Commissioner of Kamroop, dated the 3rd December 1875.

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IN THE MATTER OF PURSOORAM BOROOAH.

Baboos *Rash Behary Ghose* and *Krishna Komul Bhattacharjee* for the petitioner.

The *Junior Government Pleader* (Baboo *Juggodanund Mookerjee*) for the Crown.

THE facts and arguments are sufficiently stated in the judgment of Markby, J., which was as follows:—

In this case an important question is raised as to the powers of a Magistrate in the province of Assam.

It appears that one Pursooram was, in December last, tried summarily and convicted by Mr. Carnegy for the offence of giving false information to a public servant. A reference was made upon the subject to this Court by the Judicial Commissioner of Assam upon other points than those now before us, and this Court, upon that reference, refused to interfere. A petition was then presented on the 5th April on behalf of the prisoner, praying that the conviction and sentence be set aside upon the ground that Mr. Carnegy had not the power to try the prisoner summarily.

The circumstances of the case, so far as they bear upon the power of Mr. Carnegy to try this prisoner summarily, appear to be these:—

Mr. Carnegy, in the year 1872, held the office of Assistant Commissioner in the district of Assam, which was then what is called a Non-regulation District under the Local Government of Bengal. On the 1st of January 1873, a Resolution of the Local Government of Bengal was published in the *Calcutta Gazette*, by which it was directed, under the provisions of the Code of Criminal Procedure, that the officers and others whose names appeared in the schedule therewith published should in each case exercise the powers shown opposite their names in the districts shown in the schedule. In the schedule we find under the heading "Seebsaugor District" the name of Mr. Carnegy, and opposite his name are the words "charge of Jorehaut Division, with first class powers and powers under s. 222." This latter section is the one which relates to summary trials.

No earlier Gazette or appointment of Mr. Carnegy has been produced before us, but I think this is sufficient evidence that

Mr. Carnegy was the Magistrate of the Jorehaut Division of the District of Seebsaugor (see s. 28 of the Code of Criminal Procedure) at that time and had the power to try offences summarily in that district.

On the 6th February 1874, certain territories, including the districts of Seebsaugor and Kamroop, were removed from the Government of the Lieutenant-Governor of Bengal and placed under a Chief Commissioner. In April 1874, Mr. Carnegy, having obtained furlough on medical certificate from the Government of India for one year, left India shortly afterwards. Several officers in succession were appointed, whilst Mr. Carnegy was absent, to take charge of the Jorehaut Subdivision. In the month of September 1875, Mr. Carnegy, having obtained leave from the Secretary of State to return to duty, arrived in India. He never returned to the district of Seebsaugor, nor up to this time has he resigned or vacated his office as Magistrate in that district, otherwise than he may have done so by reason of the circumstances above mentioned. On the 25th of September there appeared a notification in the *Assam Gazette* that Mr. Carnegy, Assistant Commissioner, was "posted" to the district of Kamroop, and on the same day there appeared a further notice in this Gazette that Mr. Carnegy was vested with the powers of a Magistrate of the first class.

Upon these facts it seemed to us, when the matter was before us on a former occasion, that Mr. Carnegy had no power to try prisoners summarily in the district of Kamroop. The exercise of those powers was originally limited to the district of Seebsaugor, and when Mr. Carnegy was posted to Kamroop (whatever that may mean), whilst on the one hand he was expressly authorized to exercise the powers of a first class Magistrate in the district of Kamroop, the remaining power which had been formerly conferred upon him of trying prisoners summarily was not regranted.

It was at this juncture that we released the prisoner upon bail, but we abstained from quashing the conviction, because the matter being one which affected the jurisdiction of a judicial officer and possibly of many judicial officers, we thought the Local Government ought to be represented.

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Baboo Juggodanund Mookerjee has now appeared for the Local Government. He has not given us any additional information, but he relies entirely upon the provisions of s. 56 of the Code of Criminal Procedure, by virtue of which he contends that all the powers conferred upon Mr. Carnegy in Seebsaugor are extended to Kamroop.

That section provides as follows:—"Whenever any person holding an office in the service of Government, who has been invested with any powers under this Act or any enactment hereby repealed in any district, is transferred to an equal or higher office of the same nature within another district, he shall, unless the Local Government otherwise directs, continue to exercise the same powers in the district to which he is so transferred."

Upon this section two questions have been raised: 1st—Was Mr. Carnegy "transferred" within the meaning of the section; 2nd—Is the operation of the section prevented because the Local Government has "otherwise directed."

Neither of these questions is free from difficulty. With regard to the first it is said, that by going on furlough Mr. Carnegy vacated his former appointment, and could not therefore on his return be transferred; that no order transferring him has been made, and that the term "posted" indicates not a transfer, but a fresh appointment. But that word is ambiguous, and, before deciding the question upon this ground, it would be necessary to see whether Mr. Carnegy ever really vacated his former appointment. Upon this matter there is, as far as I am aware of, no rule laid down by authority. Prior to 1868 it was, I believe, always understood that any officer going on furlough vacated his appointment, and under an order of the Government of India of the 16th December 1861, it is expressly declared that "Civil Servants taking furlough will vacate their offices." Mr. Carnegy was not a Covenanted Civil Servant, and to what furlough rules he may have been subject prior to 1868 I am not quite sure, but I believe the rule that officers going on furlough vacated their appointments was universal.

On the 16th June 1868, however, an order was published, which directs that, except as hereinafter provided, "an officer, when on furlough, shall retain a lien on his substantive appoint-

ment, or on an appointment of similar character and not less salary." This is applicable to all officers, whether covenanted or uncovenanted. It seems to me extremely doubtful whether the effect of this last rule is that the officer taking furlough retains his appointment. To my mind it rather indicates the contrary. The matter, however, may not depend entirely upon those rules, which are furlough rules only issued by Government in the Financial Department. It may be that what really vacates an office is not the going on furlough, but the appointment of another person to the office; and, as far as I have seen, no person was especially appointed to succeed Mr. Carnegy in his office as Magistrate in the district of Seebsaugor. The number of Subordinate Magistrates in a district being unlimited, there was no necessity for doing so. And this seems to be the view of the Local Government of Assam; for whilst Mr. Carnegy's powers were conferred afresh, it does not appear that he ever received any fresh appointment as Magistrate. He is, no doubt, treated as having ceased to be Magistrate of a division of a district, but he is apparently treated as being still, on his return, a Subordinate Magistrate *in* or *of* a district, which district could have been no other than the district of Seebsaugor.

I should, therefore, desire further consideration before holding that Mr. Carnegy vacated his former appointment by going on furlough, and that on this ground he was not transferred to the district of Kamroop within the meaning of s. 56; I desire to be understood as expressing no opinion upon this point.

But there remains the second question, whether the operation of the section is prevented, because the Local Government has otherwise directed.

If we take s. 56 quite literally, it would seem to indicate that the "direction otherwise" there alluded to was a direction contemporaneous with the transfer. This would render a special direction necessary in every case of transfer where the powers had already been locally restricted under s. 38. But when the Local Government had already declared its intention on this subject, this would seem to me to be superfluous. And it does not appear to me necessary to put this construction on s. 56. I think that the words "unless the Local Government

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otherwise directs" reasonably construed will include a previous restriction under s. 38, as well as one imposed when the transfer is made. This accords with the view taken by the Local Government of Assam, which (as before pointed out) clearly treated the powers conferred upon Mr. Carnegy as having come to an end.

Upon this last ground, therefore, I hold that Mr. Carnegy has no summary powers under s. 222 in the district of Kamroop; and I, therefore, think that we ought to quash the conviction and discharge the sureties.

MITTER, J.—I am also of the same opinion. It seems to me that the effect of the Government Resolution, dated 1st of January 1873, was to confer upon Mr. Carnegy powers under s. 222 of the Criminal Procedure Code within the Subdivision of Jorehaut only. That being so, it cannot be said that he was "transferred to an equal or higher office" of the nature of that which he held in the district of Seebsaugor; because, supposing he was transferred within the meaning of that section and that he never vacated his appointment, the office to which he was transferred in the district of Kamroop is neither equal to nor higher than that he held in the district of Seebsaugor. A reference to ss. 27 and 28 of the Code will show that the powers of a Magistrate of a division of a district are higher than those of a Magistrate of the first class not in charge of any subdivision. I am, therefore, of opinion that, under the section (56) referred to above, Mr. Carnegy did not continue to exercise the same power which he had while in charge of the Subdivision of Jorehaut.

Conviction quashed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

POORNO CHUNDER COONDOO *v.* PROSONNO COOMAR SIKDAR AND ANOTHER.

1876 *Dec. 7.*

Limitation—Act IX of 1871, *sched. ii, cl.* 157—*Execution of Ex parte Decree.*

Notice of execution of decree is not sufficient "process for enforcing" it within the meaning of cl. 157, sched. ii, Act IX of 1871. Such process means actual process by attachment in execution of the person or property of the debtor.

APPLICATION on notice under s. 119 of Act VIII of 1859 to set aside an *ex parte* decree.

The decree had been made on 3rd July 1876; and, without proceeding to execute it, the original plaintiffs assigned it on the 7th September to Poorno Chunder Coondoo, the present plaintiff, by whom, on the 21st September, a notice of execution was served on the defendants, calling on them to appear and show cause why execution should not issue against them. On the re-opening of the Court after the Durga Poojah vacation, the attorney for the defendant Ramnarain Dutt, on 16th November, attended before the Judge in Chambers, but the matter was ordered to stand over. On the 29th November, the defendant Ramnarain served the plaintiff with notice of the present application to set aside the decree.

Mr. *T. A. Apcar*, for the plaintiff, objected that the application was barred by lapse of time. The provisions with respect to the time within which such an application must be made are laid down in Act IX of 1871, sched. ii, cl. 157, under which the time limited for making the application by a defendant is 30 days from the date of executing any process for enforcing the judgment. It is submitted that notice of execution is sufficient process for enforcing the judgment within this clause: see *Obhoychurn Dutt* v. *Mudoosudan Chowdhry* (1), a decision on the same words in s. 119, Act VIII of 1859.

(1) 5 Wym, 172.

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Mr. *Bonnerjee* for the defendant Ramnarain.—This is not a notice under s. 216 as in the case cited. Here the decree had been assigned, and we received notice of execution by a party who was not the original plaintiff. Such a notice would not necessarily give us any knowledge of the decree obtained by the original plaintiff. There are cases opposed to that cited. [PONTIFEX, J. —Another decision on that section lays down that the words mean process against the person or property of the defendant—*Shib Chunder Bhadoree* v. *Luchhee Debia Chowdhrain* (1).]

Mr. *Apcar* in reply.—That case does not decide the present point. In the Full Bench case of *Ram Sahai Sing* v. *Sheo Sahai Sing* (2), it was held that the issue of a notice under s. 216 of Act VIII was a sufficient proceeding to enforce a decree within s. 20, Act XIV of 1859. [PONTIFEX, J., refers to the Full Bench decision in *Radha Benode Chowdhry* v. *Digumburee Dabee* (3), where it was held that process for enforcing the judgment is executed within the meaning of s. 119, when attachment has taken place.] There it is not decided that notice of execution would not be a sufficient process. [PONTIFEX, J.—Suppose your application to execute had been refused, there would then have been no process.] The time is intended to run from the date when the defendant gets knowledge of the decree, which he would do by receiving notice of intention to execute it.

PONTIFEX, J.—I have very little doubt that process of execution means actual process by attachment in execution of the judgment-debtor's person or property. The case of *Obhoychurn Dutt* v. *Mudoosudan Chowdhry* (4) is opposed to this: but I prefer the decision in *Shib Chunder Bhadoree* v. *Luchhee Debia Chowdhrain* (1). In my opinion mere notice of execution is not sufficient process for enforcing the decree.

Attorney for the plaintiff: Mr. *W. G. Francis.*

Attorney for the defendant Ramnarain Dutt: Baboo *Nobin Chunder Burral.*

(1) 6 W. R., Mis., 51. (2) B. L. R., Sup. Vol., 492.
(3) B. L. R., Sup. Vol., 947; S. C., 9 W. R., 236.
(4) 5 Wym., 172.

APPELLATE CIVIL.

Before Mr. Justice Glover and Mr. Justice R. C. Mitter.

NIL MONEY SINGH DEO (PLAINTIFF) *v.* CHUNDERKANT BANERJEE (DEFENDANT).*

1876 *Mar.* 21.

Enhancement of Rent, Notice of—Tullubi Bromuttur Tenure—Regulation VIII of 1793, *s.* 51.

A tullubi bromuttur tenure, which has been held as such from the time of the decennial settlement, is such an intermediate tenure as entitles the holder to a notice under s. 51, Reg. VIII of 1793.

SUIT for arrears of rent for the year 1278 (1871-1872) of Mouzah Charpotia, held by the defendant after notice of enhancement under s. 13, Act X of 1859.

The main defence was, that the mouzah in question was held by the defendant as a tullubi bromuttur tenure, and had been held as such from the date of the decennial settlement at a fixed rate of rent, and, therefore, the rent could not be enhanced on any of the grounds specified in s. 17; and the notice under s. 13 was, consequently, illegal and inapplicable to tenures of the nature of that held by the defendant.

The suit was dismissed in the first Court and also on appeal, and on special appeal to the High Court it was remanded for a distinct finding as to the nature of the defendant's tenure.

The Deputy Collector of Maunbhoom, on remand, found that the mouzah had been held from the time of the decennial settlement as a tullubi bromuttur tenure, and that, as the holder of such a tenure, the defendant had an intermediate holding between the proprietor of the estate and the ryots, and inasmuch as he should, therefore, be proceeded against under s. 51, Regulation VIII of 1793, the notice served on him under s. 13, Act X of 1859, was not sufficient. He, therefore,

* Special Appeal, No. 149 of 1875, against a decree of the Judicial Commissioner of Zilla Chota Nagpore, dated the 21st of November 1874, affirming a decree of the Assistant Commissioner of Maunbhoom, dated the 26th of August 1874.

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dismissed the suit, and his finding and decision were affirmed on appeal by the Judicial Commissioner.

The plaintiff preferred a special appeal to the High Court, on the grounds, among others, that even admitting the tenure to be one contemplated by Regulation VIII of 1793, no particular form of notice was necessary, and the notice served was sufficient; and that the finding of the lower Courts, that the tenure was a tullubi bromuttur tenure, and had been held as such from the decennial settlement, did not bring the tenure within the class of talooks or tenures the rent of which could not be enhanced without service of notice on the holder under s. 51 of Regulation VIII of 1793.

The *Advocate-General*, offg. (Mr. *Paul*), Mr. *Woodroffe*, and Baboos *Umbica Churn Bose* and *Opendro Chunder Bose* for the appellant.

Baboo *Chunder Madhub Ghose* for the respondent.

The judgment of the Court was delivered by

GLOVER, J.—We cannot go behind the order of remand made by this Court on the 15th January 1874. The case was then sent back to the Assistant Commissioner "to have it distinctly tried what is the nature of the defendant's tenure. On the finding on that issue will depend whether or not the plaintiff is entitled to recover in this suit on the notice which he has already served."

Both the lower Courts have now found that the defendant's tenure is a "tullubi bromottur one," held as such from the time of the perpetual settlement, and, therefore, such an intermediate tenure as entitles the holder to a notice under s. 51, Regulation VIII of 1793.

* * * * * * *

There is, undoubtedly, evidence on the record showing that, at the time of the decennial settlement, the defendant's holding was entered in the records as a tullubi bromuttur one paying a quit-rent of sicca Rs. 182-9, and that the Judicial Commissioner has found that this was the nature of the holding.

In *Rajah Nilmoney Singh* v. *Chunder Cant Banerjee* (1), a case almost precisely similar to this and between the same parties, it was held that a tullubi bromuttur tenure was one that entitled the owner to notice under Regulation VIII of 1793. And in *Rajah Nilmoney Sing* v. *Ram Chuckerbutty* (2), the result was much the same. It was held in that case that the defendant's tenure, being found to represent a permanent transferable interest in the land intermediate between the proprietor of the estate and the ryots, came under the provision of the Regulation, and gave its owner the right to notice under the law of 1793. In that case also the plaintiff was the same person as the plaintiff in this case, and the defendants set up the same defence as that made in the present suit. This suit has, moreover, been twice remanded, so that it is hardly possible to conceive a case in which the plaintiff had a better opportunity to ascertain what his rights were and to bring them forward in a proper and legal manner.

It is argued that the evidence on which the Judicial Commissioner has relied does not prove that the defendant is an intermediate holder. This was a question of fact with which the Court below had exclusive power to deal, and it has not been in any way shown us that the finding was come to upon no evidence. It cannot indeed be said so in the face of the entry of this holding as a tullubi bromuttur one in the settlement papers of 1790.

It may be that the defendant has cultivated, or does cultivate some part of the holding himself, but this would not deprive him of his position as the holder of an intermediate tenure.

We think that the Judicial Commissioner has found upon sufficient legal evidence that the defendant holds an intermediate tenure, and upon this finding, as laid down in the remand order of 1874, depended the question whether the plaintiff was entitled to sue for enhanced rent under the notices he had already served.

The special appeal is dismissed with costs.

Appeal dismissed.

(1) 14 W R, 251. (2) 21 W R, 439.

Before Mr. Justice Markby.

1876
Dec. 15.

IN THE MATTER OF THE PETITION OF LALLA GOPEE CHAND AND OTHERS.*

Privy Council Appeals Act (VI of 1874), ss. 8 and 11, cl. b—Limitation Act (IX of 1871), s. 5—Practice—Closing of the Court—Deposit of money under cl. 6, s. 11, Act VI of 1874—Power of the Court to grant special permission.

The petitioners had obtained a certificate on the 1st of September to appeal to Her Majesty in Council from a decision passed against them by the High Court on the 4th of May. Accordingly the period during which they were required to deposit the amount for the translation of the record, under s. 11, cl. *b*, of Act VI of 1874, expired on the 4th of November. The offices of the Court re-opened after the vacation on the 23rd October, but the Benches did not begin to sit till the 16th November. On the last mentioned date, the petitioner brought in the money, and it was refused by the officer of the Court as being too late. *Held*, that it was rightly refused, and that the Court had no power to grant permission to deposit it after the prescribed time (1).

Application for special permission to deposit in Court the amount required from the petitioners under cl. *b*, s. 11, Act VI of 1874.

The petitioners had, on the 1st of September, 1876, obtained a certificate under s. 9 of the Act to appeal to Her Majesty in Council from a decision of the High Court passed against them on the 4th of May. Under s. 11 of the Act they were bound to deposit the amount required to defray the expense of translating, transcribing, indexing, and transmitting to Her Majesty in Council, a correct copy of the whole record of the suit within six months from the date of the decree complained of, or within six weeks from the grant of the certificate, "whichever is the later date." The six months from the date of the decree expired on the 4th of November; and the six weeks, on the 13th of October. The last day, therefore, for making the deposit was the 4th of November.

* Privy Council Appeal, No. 28 of 1876, in Regular Appeal No. 103 of 1875.

(1) See 23 W. R., 220.

The estimate upon which the deposit was to be made was ready on the 18th of September. The offices of the Court were closed from the 21st of September until the 23rd of October, both days inclusive. The money, however, was not brought to the officer until the 16th of November, and he then declined to receive it. The petitioners claimed the benefit of s. 8 of Act VI of 1874, and prayed for special permission to make the required deposit.

Baboo *Mohesh Chunder Chowdry* appeared in support of the petition.

Baboo *Chunder Madhub Ghose* appeared to oppose it.

MARKBY, J.—(after stating the circumstances connected with the application, continued):—In my opinion the officer was right in declining to receive the deposit. The applicant claims the benefit of s. 8 of Act VI of 1874 and s. 5 of Act IX of 1871, the 16th of November being the day on which the Court re-opened in the sense that that was the day upon which the Benches sat as usual for the first time. But those sections only apply to suits, appeals, and applications. No application was necessary in this case; the money is merely brought to the officer of the Court, who receives it making the usual entries, and this could have been done on any day after the 23rd of October.

I have enquired as to the practice, and I find that it has always been usual, when the last day falls during the period when the offices are closed, for the money to be brought in before the holidays commence.

I am also asked to give permission that the money be deposited now. I do not think I have power to do that.

Application refused.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1877 *Jany.* 11.

NIRMUL CHANDRA MOOKERJEE AND ANOTHER *v.* DOYAL NATH BHUTTACHARJEE AND OTHERS.

Suit in formâ pauperis—Act VIII of 1859, *ss.* 367—371—*Continuation in formâ pauperis of suit commenced in ordinary form.*

The power of the Court to allow a suit to be instituted in *formâ pauperis* includes the power to allow a suit to be continued as a pauper suit after it has been commenced in the ordinary form.

THIS suit was filed in the ordinary way under Act VIII of 1859, and the defendants appeared and filed their written statement, and the suit was ready for hearing; but, in consequence of the illness of one of the defendants, the hearing was postponed on three occasions. After the postponement on the last occasion, the plaintiffs presented a petition, praying to be allowed to continue the suit *in formâ pauperis,* stating that they had no means to carry it on by paying the Court fees. After a preliminary enquiry as to the plaintiffs' means, the Court ordered that notices should be issued to the defendants, calling on them to show cause why the plaintiffs should not be allowed to continue the suit *in formâ pauperis.* On the matter coming on for hearing—

Mr. *Bonnerjee,* for the defendants, objected, that the Court had no power to grant the application,—Act VIII of 1859 not providing for a case like the present. Under that Act a person it only entitled to commence a suit *in formâ pauperis,* but not to continue as a pauper suit, a suit commenced in the ordinary way. Act VIII of 1859, too, enacts, that the petition to be allowed to sue as a pauper is to be taken as the plaint in the suit but the plaintiffs had had the advantage of seeing the defendants' written statement before filing that petition. There cannot be two plaints in the suit. The proper course is to allow the plaintiffs to withdraw their suit with liberty to bring a fresh one as paupers.

Mr. *D. Orr*, for the plaintiffs, was not called on.

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PONTIFEX, J.—I think the Court has power to grant this application, if the plaintiffs are actually paupers. The power to allow a case to be continued as a pauper suit is, I think, included in the power given to the Court to allow a suit in *formâ pauperis* to be instituted.

Attorney for the plaintiffs: Mr. *Pearson*.

Attorney for the defendants: Baboo *P. C. Mookerjee*.

PRIVY COUNCIL.

[On appeal from the High Court of Judicature at Fort William in Bengal.]

IN THE MATTER OF THE PETITION OF HADJEE ABDOOLLAH.

REASUT HOSSEIN *v.* HADJEE ABDOOLLAH AND ANOTHER.

P. C.*
1876
May 24.

Registration Act (VIII of 1871), *s.* 76—*District Court—Order refusing Registration—Proceeding to compel Registration—Review—Act XXIII of* 1861, *s.* 38—*Act VIII of* 1859, *s.* 376.

The Registration Act of 1871 gives power to the Government to appoint Districts and Sub-Districts for the purposes of registration; but the "District Courts" mentioned in the Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary Zilla Courts.

Semble.—The final words of the 76th section of the Registration Act, which declare that "no appeal lies from any order made under this section," apply to an order rejecting, as well as to an order admitting, an application for registration.

Quære.—Whether after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registration by means of, a regular suit? *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1) referred to and distinguished.

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, AND SIR R. P. COLLIER.

(1) 14 Moore's I. A., 129; S. C., 9 B. L. R., 433.

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An order rejecting an application for registration, under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a 'decree' within the meaning of Act VIII of 1859, as to fall within the operation of the sections of that Act which provide for the admission of a review.

S. 38, Act XXIII of 1861, which enacts that "the procedure, prescribed by Act VIII of 1859, shall be followed as far as it can be in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court," renders the whole procedure of Act VIII of 1859 including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence.

THIS case arose out of an application made by the appellant Reasut Hossein for the registration of a deed of gift which he alleged had been executed by Mussamut Noorun, the mother of his deceased wife Bechun, in favor of the children of the appellant by Bechun. The deed purported to have been executed by Noorun on the 19th November, 1871, and to confer on the said children the share of certain immoveable property which Noorun had, under the Mahomedan law, inherited from her daughter. Noorun died on the 18th December, 1871, and the deed was presented for registration in the January following, at the office of the Sub-Registrar of Gya, within whose district a part of the lands affected by the deed lay. In accordance with ss. 34 and 35 of the Registration Act, the Sub-Registrar summoned before him the respondents, who are the sons of Noorun's brother, and her heirs by the Mahomedan law, to ascertain whether they admitted the execution of the deed. On their appearing and denying its execution, the Sub-Registrar refused to register the deed. The appellant, thereupon, presented a petition, under the 73rd section of the Registration Act, to the Zilla Judge of Gya, praying that an order might be passed, directing the Sub-Registrar to register the deed. The respondents presented a counter-petition, in which they alleged the deed to be a forgery. On the 23rd August, 1872, the Judge, having heard witnesses in support of the deed and none to impeach it,

was of opinion that the circumstances of the case "created serious doubts as to the genuineness of the alleged execution," and refused to order registration. The appellant, on the 17th September, 1872, petitioned for a review and for the reversal of this order, urging that the Judge had not rightly weighed the evidence submitted to him, and had refused to look at, or consider the effect of, certain deeds which the petitioner alleged were material evidence in the case. Before this petition was presented, Mr. Tayler, the Judge who had pronounced the order of the 23rd August, was removed to another district, and the petition fell to be heard by his successor in office Mr. Craster, who admitted the case for review by an order dated the 4th January, 1873 (1).

Against this order, as made without jurisdiction, the respondents petitioned the High Court invoking its extraordinary jurisdiction. The case coming before a Division Bench (Phear and Ainslie, JJ.), a rule was granted, calling on the appellant to show cause why the order of the 4th January, 1873, admitting the application for review, should not be set aside as made without jurisdiction. On the 2nd April, 1873, after hearing the parties, the rule was made absolute with costs; and the order of the Judge, admitting the review, was set aside (2).

From this judgment, Reasut Hossein appealed to Her Majesty in Council.

Mr. *Doyne*, for the appellant, contended, that the order passed by the High Court was *ultra vires*, since that Court has no superintending power over the "District Courts" contemplated by the Registration Act of 1871. By the interpretation clauses contained in s. 3 of that Act, "District and Sub-District" are respectively explained to mean "a District and Sub-District formed under this Act;" and s. 5 provides that, "for the purposes of this Act, the local Government shall form Districts and Sub-Districts, and shall prescribe, and may, from time to time, alter the limits of such Districts and Sub-Districts." It followed that the "District Courts," referred to in s. 10 of

(1) See 10 B. L. R., 395, where the order is set out. (2) 10 B. L. R., 394.

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the Act, were Courts exercising jurisdiction within the districts so created by the Government, and were, therefore, not identical, or necessarily co-extensive as to the area of their jurisdiction with the District Courts ordinarily so called, which are undoubtedly subject to the control and revisional superintendence of the High Court. [SIR J. COLVILE.— No power is given to the Government by the Act to create District Courts. I should infer that the District Courts, referred to in s. 10, are the ordinary Zilla Courts. The districts which the Government is authorized to create are merely administrative, for purposes of registration.] It is submitted that, under the Act, the jurisdiction of the Judge in dealing with registration cases, is distinct from his ordinary jurisdiction, and is not subject to the interference of the High Court.

Assuming that the High Court has a power of superintendence in registration cases, that Court has exercised it wrongly in setting aside the order of the Judge admitting a review of his predecessor's judgment. Under s. 76 of the Registration Act, there is no appeal from the order of a Judge who refuses to enforce registration. The appellant was consequently obliged to seek a remedy by review. [SIR J. COLVILE.—The purpose of a review is to correct errors, not to retry a case on the same evidence.] Under s. 376 of the Civil Procedure Code, a review may be applied for for any good and sufficient reason, and, under s. 378, may be granted, "where it is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice." [SIR R. COLLIER.—Under s. 376 you must show that what you asked to be reviewed was a decree, and further that there was good and sufficient reason for the review.] The refusal to register was a final order, which could not be made the subject of an appeal to a Superior Court. It was a decree within the meaning of s. 376. That section has been held to admit a review of orders passed in execution proceedings—*Haradhun Mookerjee* v. *Chunder Mohun Roy* (1). To obtain a review, it is not necessary to show that there has been an error in law, or that fresh evidence

(1) Marshall, 204

has been discovered; other reasons may be good and sufficient. But here there was an error in law, for the Judge not only decided the case against the weight of evidence, but also refused to admit evidence which he should have admitted. The Judge, moreover, had dealt with the case, as if he were trying the validity of the deed in a suit to set it aside as forged. That was a mistaken view of his duty.

Mr. *J. D. Bell* for the respondents.—The appellant's proper remedy was by appeal, see ss. 23 and 38, Act XXIII of 1861. Where a Judge refuses to make an order for registration, an appeal is not excluded by the provisions of s. 76 of the Registration Act. Assuming that a refusal to order registration is subject to review under ss. 376—378 of the Civil Procedure Code, here no case had been made for granting a review. The application for review did not show that there had been any mistake in law, or that new evidence had been discovered; it merely alleged that the judgment was opposed to the weight of evidence, and asked that it might be reversed on the evidence already before the Court. A contention that the Court has decided against the weight of evidence, is matter for an appeal, not for a review—*Nasirruddin Khan* v. *Indronarayan Chowdhry* (1) and *Juggodumba Dabea* v. *Munneeruttun Mookerjee* (2).

Mr. *C. W. Arathoon* on the same side.—Assuming that under s. 76 of the Registration Act no appeal lies against the order of a Judge refusing to enforce registration, still the order is not of the nature of a final decree, since the person whose application is rejected has a remedy by way of a regular suit to have his deed registered; see *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (3). [SIR B. PEACOCK referred to Daniell's Chancery Practice, Vol. II, p. 1422, as showing the distinction recognized in the Court of Chancery between a review and a re-hearing.] As to when a review should not be admitted, see *Jhubhoo Sahoo* v. *Mussamut Jusoda Koer* (4).

Mr. *Doyne* in reply.

(1) B. L. R., Sup. Vol., 367, at p. 371.

(2) S. D. A., 1858, p. 1539.

(3) 14 Moore's I. A., 129; S. C., 9 B. L. R., 433.

(4) 17 W. R., 230.

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At the close of the argument, their Lordships' judgment was delivered by

SIR J. W. COLVILE.—This is an appeal against an order of the High Court of Calcutta, dated the 2nd April, 1873, by which that Court, in the exercise of its extraordinary and statutory jurisdiction of superintendence over the inferior Courts, set aside an order of the Judge of Gya, dated the 4th January, 1873.

(After shortly stating the facts as to the presentation of the deed for registration, His Lordship continued):—It is admitted to be one which can have no force or validity, or be capable of being produced in any Court of Justice in evidence, unless it be registered; and the heirs of the party who is alleged to have executed it, having denied the execution of it by her, the Registering officer was under the Act bound to refuse to register it. The Act gives an appeal from the Sub-Registrar to the Principal Registrar, but, as he was equally bound to refuse registration of an instrument of which the execution was thus disputed, such an appeal would have been obviously infructuous; and the appellant accordingly took the course of applying, under the 73rd and following sections, to the Zilla Judge at Gya, for an order upon the Registrar to register the deed.

(His Lordship, after stating the proceedings up to the application for review to Mr. Craster, continued):—That application in terms purported to be made under ss. 376 and 378 of Act VIII of 1859, and the counter-petition filed by the respondents seems to admit that the application was so made, and that a review of such an order might be had under those sections upon proper grounds, although it contends that what the petition sought in the particular case was in the nature rather of an appeal than of a review within the meaning of the Act.

(After stating the further proceedings, His Lordship continued):—A point was taken, though not very strongly pressed, at the Bar, to the effect that this order of the High Court was itself *ultra vires*, inasmuch as the order which it set aside must be taken to have been made, not by one of the ordinary Zilla Courts, over which the High Court has an unquestioned power

of superintendence, but by a District Court created by the Registration Act, over which it has no such power. Their Lordships can see no ground for this contention. It appears to them, looking at the Act of 1871, that although power is there given to the Government to appoint districts and sub-districts for the purpose of registration, the District Courts mentioned in the Act (except where the High Court is said to be, when exercising its local jurisdiction, a District Court within the meaning of the Act), must be taken to be the Courts exercising the ordinary civil jurisdiction within that district; and, therefore, in the case of a regulation province, to import the ordinary Zilla Courts.

Another question raised was whether under the 76th section (of which the final words are, "no appeal lies from any order made under this section"), an order, against which no appeal can be preferred, must not be taken to mean only one by which the Judge directs the Registrar to register a deed, and whether there may not be an appeal from an order like that passed by Mr. Tayler rejecting the application for registration. Their Lordships would have great difficulty in saying that an order of rejection does not fall within the term "an order made under this section;" because if the Judge does not make his order of rejection under the 76th section, it is difficult to see what other section gives him jurisdiction to make it. They do not, however, think it necessary to decide the question, because it is obvious that, whether an appeal lies from the order or not, the right, if it exists, of reviewing an order may co-exist with the liberty to appeal; and, consequently, that the question whether the power of the Judge of first instance to review his order exists cannot be affected by the consideration whether an appeal lies from that order.

Another question raised, which it is equally or perhaps still more unnecessary to decide, is that suggested by Mr. Arathoon, *viz.*, that, although a final order rejecting the application for registration may be made in this summary way, it would still be open to the parties benefited by the deed to propound it in a regular suit, and to obtain its registration by means of such suit. Their Lordships conceive

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that it will be time enough to decide this question when it arises. They only desire to observe that the case of *Futteh Chund Sahoo* v. *Leelumber Singh Doss* (1) is no authority upon it. In that case, the suit was for the specific performance of an unregistered agreement for sale, and sought to have, not the agreement, but the conveyance to be executed in pursuance of it, registered; and all that was decided was that the agreement not having been registered could not be given in evidence in the suit.

The principal question which their Lordships have to decide upon this appeal is whether the power to admit a review which is given by Act VIII of 1859 (ss. 376—378, and the following sections) does exist in such a proceeding as that under consideration, as it would unquestionably exist in a regular suit.

If the general power is found to exist, a subordinate question may arise, whether if the exercise of the power is not in strict accordance with the provisions of those sections, the order admitting the review can be quashed as one made wholly without jurisdiction.

Their Lordships are disposed to think that an order, rejecting an application for registration, under the Act of 1871, must be taken to be so far in the nature of a decree, within the meaning of Act VIII of 1859, as to fall within the operation of the sections in question. The proceeding may be what is technically called in India a miscellaneous proceeding, or it may be a summary suit; but the order made upon it is, so far as concerns the matter in dispute, final between the parties. Whether it is subject to appeal or not, it is, so far as the Court pronouncing it is concerned, a final order of adjudication between the parties.

But it seems to their Lordships that the determination of this question does not depend upon the mere construction of Act VIII of 1859, because by the 38th section of the amending Act of 1861 it is expressly enacted, "that the procedure described by Act VIII of 1859 shall be followed as far as it can be in all miscellaneous cases and proceedings which,

(1) 14 Moore's I. A., 129; S. C., 9 B. L. R., 433.

after the passing of the Act, shall be instituted in any Court." This provision, their Lordships conceive, expressly makes applicable to a proceeding to compel registration under the Registration Act the whole procedure of Act VIII of 1859, including the power of admitting a review. And this was in fact almost admitted at the Bar by Mr. Bell, when he was contending that the right of appeal to the High Court would, under the 23rd section of the Act XXIII of 1861, have existed in this case.

It is argued, however, that if the 376th and following sections of Act VIII of 1859 do apply to an order rejecting an application for registration, they do not justify the particular exercise of jurisdiction in this case. The 376th section says:—"Any person considering himself aggrieved by a decree of a Court of original jurisdiction from which no appeal shall have been preferred to a Superior Court, or by a decree of a District Court in appeal, from which no special appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court from which either no appeal may have been preferred to Her Majesty in Council, or, an appeal having been preferred, no proceedings in the suit have been transmitted to Her Majesty in Council, and who from the discovery of new matter or evidence which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or for any other good and sufficient reason, may be desirous of obtaining a review of the judgment passed against him, may apply for a review of judgment by the Court which passed the decree." The application is to be made within ninety days of the date of the decree, unless the party can show just and reasonable cause for having delayed his application. Then the 378th section enacts:—"If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application; but if it shall be of opinion that the review desired is necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice, the Court shall grant the review, and its order in either case, whether for rejecting the application or granting the review, shall be final." And then follows a provision that the opposite party is to have notice. And the respondents contend that the

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order admitting a review in this case, though not the proper subject of appeal, was liable to be quashed, on the ground that the Judge had no jurisdiction to entertain the application, inasmuch as there was before him no distinct allegation of an error of law, nor any suggestion of the discovery of new evidence.

Their Lordships, looking to the original application to review, are by no means satisfied that it does not contain enough to give the Judge cognizance of the matter upon the strictest construction of Act VIII of 1859. They allude particularly to the eighth ground of the petition, which refers to certain deeds and to certain evidence which seems to have been tendered in the course of the inquiry before Mr. S. H. C. Tayler, and rejected by him as unnecessary. That evidence, if not very material to the general question, was by no means immaterial with reference to one ground which the learned Judge gave for rejecting the application, because he dealt with the fact of the deed being for consideration, whereas that which was propounded was not for consideration. Therefore, if he allowed that matter to influence his judgment, it seems to be reasonable that the parties should have the opportunity of explaining those circumstances, and of having that evidence which he refused to admit brought before the Court upon a review; the evidence in fact would be in the nature of evidence which they had been from some cause prevented from adducing on the original hearing.

Their Lordships, however, do not rest their decision upon that narrow ground, because looking to the extreme generality of the terms used in these sections, particularly to these terms: "other good and sufficient reason" and "necessary to correct an evident error or omission, or is otherwise requisite for the ends of justice," they are not prepared to say that there is an absolute defect of jurisdiction whenever the parties have failed to show that there was either positive error in law, or new evidence to be brought forward which could not be brought forward on the first hearing. They do not consider that the case of *Nasirruddin Khan* v. *Indronarayan Chowdhry* (1) and the other cases

(1) B. L. R., Sup. Vol., 367.

cited (only?) limit the discretion of the Court in saying what reason is good and sufficient, or what may be so far requisite to the ends of justice as to support an application for review. Upon an appeal, where an appeal lies, it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review; but that is a very different thing from ruling that he has acted wholly without jurisdiction. In the first case, the Appellate Court reverses the order, because the Judge has erred in the mode in which he has exercised a judicial discretion; in the latter case, it quashes the order, because there was no discretion at all to be exercised.

Their Lordships, for these reasons, are of opinion that the order of the High Court which is under appeal cannot be supported; and they must humbly advise Her Majesty to allow this appeal, to reverse the order of the High Court, and in lieu thereof to order that the rule to show cause why the order of Mr. Craster should not be set aside be discharged, with the usual costs in the High Court.

The appellant, who has been obliged to come here, must, of course, have his costs of this appeal.

Appeal allowed.

Agent for the appellant: Mr. *T. L. Wilson.*

Agent for the respondents: Mr. *Horace Earle.*

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr Justice Macpherson, and Mr. Justice Markby.

BHYRUB CHUNDER BUNDOPADHYA (PLAINTIFF) *v.* SOUDAMINI DABEE (DEFENDANT).*

1876 *Aug.* 14.

Sale in Execution of Decree—Period from which Title of Purchaser dates—Confirmation of Sale—Liability of Purchaser for Government Revenue.

The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as

* Special Appeal, No. 2715 of 1874, against the decree of a Subordinate Judge of Zilla East Burdwan, dated the 28th July, 1874, modifying a decree of the Sudder Munsiff of that district, dated the 29th of October, 1873.

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zemindar and partly as putnidar: the sale took place in September, 1872, but the defendant did not obtain possession until confirmation of the sale in May, 1873. Between the date of the sale and the confirmation, a considerable sum became due for Government revenue on the whole property and to prevent its being sold, the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant, *held*, that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and, therefore, she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation.

THIS case was referred by Garth, C. J., and Birch, J., for the opinion of a Full Bench, in the following order of reference :—

GARTH, C.J.—The plaintiff and defendant in this suit became purchasers respectively of two different shares in the same property at an execution sale (1). The sale was completed on the 15th Assin, 1279, (30th September, 1872), but the defendant did not obtain possession until the 24th Bysack, 1280, (5th May, 1873). Between the date of the sale and the time when the sale was confirmed (and when the defendant obtained possession), a considerable sum became due, in respect of the whole property purchased, for Government revenue; and, in order to prevent proceedings being taken by the Government authorities to enforce payment of this sum, the plaintiff, who was the purchaser of by far the largest share of the property, paid the amount due to the Government authorities, and then brought a suit to recover from the defendant the proportion due in respect of her share.

The defendant's answer was that she did not become liable to pay any revenue to Government upon her share until after the confirmation of her purchase, and that no part of the revenue claimed accrued due after that time.

These facts being admitted, the question arises whether the defendant became liable to pay revenue in respect of her share from the date of her purchase, or from the date of confirmation of it.

(1) The defendant only was a purchaser at the execution-sale: the plaintiff held his share partly as zemindar and partly as putnidar.

Upon this point there are conflicting authorities in the High Court. The case of *Kalee Dass Neogee* v. *Hur Nath Roy Chowdry* (1) appears to have decided, that the title of an auction-purchaser under a decree relates back to the date of sale although the sale may not have been confirmed until long afterwards; the case of *Bepin Beharee Biswas* v. *Judoonath Hazrah* (2), on the other hand, appears to have decided, that the title of a purchaser under similar circumstances accrues only from the date of confirmation of the sale. The point, therefore, is referred to a Full Bench for their determination.

Babu *Sham Lall Mitter* for the appellant.—The plaintiff having paid the whole of the Government revenue is entitled to bring a suit for contribution. If the revenue had not been paid, the sale would not have been confirmed. The certificate of sale being a valid transfer, the holder is entitled to rents and profits from the date of the sale (Act VIII of 1859, ss. 259 and 264: see Macpherson's Civil Procedure Code, 5th edition, p. 304), and there is a remedy to recover against the judgment-debtor. In the form of certificate given in Broughton's Civil Procedure Code, p. 799, there is not even a blank left for the insertion of the date of confirmation, nor is there any allusion to it made in the form of confirmation of sale in use on the Appellate Side of this Court. S. 259 states what is necessary to be set out in a sale certificate, and does not mention the date of confirmation. If the judgment-debtor were to pay Government revenue, the amount paid by him would be deducted from the debt due from him. If a sale takes place in execution of a decree in force and valid at the time of sale, and the decree or judgment be afterwards reversed, the reversal does not affect the validity of the sale or the title of the purchaser—*Chunderkant Surmah* v. *Bissessur Surmah Chuckerbutty* (3). The Court must refuse to go into facts behind a sale certificate—*Lalla Bissessur Dyal* v. *Doolar Chand Sahoo* (4). It is bound to give full effect to the terms of a sale certificate, and cannot limit the effect of that certificate by conclusions

(1) W. R., 1864, Gap No., 279.
(2) 21 W. R., 367.
(3) 7 W. R., 312.
(4) 22 W. R., 181.

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and inferences drawn from other documents—*Mookhya Hurruckraj Joshee* v. *Ram Lall Gomasta* (1).

Babu *Bykanto Nath Pal* for the respondent.—The purchaser of a tenure at a sale for arrears of rent is held liable for rents from the date on which the sale may be confirmed—*Beepin Behari Biswas* v. *Jadoonath Hazrah* (2). The purchaser is required to pay only 25 per cent of the purchase-money (Civil Procedure Code, s. 253), and his right to take possession does not accrue until after 30 days, within which time the sale is liable to be reversed. If the sale is not reversed, the judgment-debtor has the right of appeal. If the sale is not confirmed, the purchaser has not any right whatever to the property, and is entitled only in the discretion of the Court to interest on the money paid: he is not held liable to debts with respect to the property purchased, until he is entitled to rents and profits. The sale is of no effect until after the confirmation: and the purchaser is not entitled to receive any benefit until he has paid the purchase-money in full.

Babu *Sham Lall Mitter* in reply.

The following opinions were delivered by the Full Bench:—

GARTH, C.J. (KEMP, JACKSON, and MACPHERSON, JJ., concurring.)—The question which we propose to decide in this case is whether the plaintiff is entitled to recover from the defendant certain sums paid by the plaintiff for Government revenue due in respect of a share, now owned by the defendant, in a zemindari, the larger share of which belongs to the plaintiff.

The proceedings do not show very accurately what the precise position of the parties is; but the facts seem to be as follows. The plaintiff owns as zemindar and putnidar (or partly as zemindar and partly as putnidar) a 15 annas 3 gandas 3 cowries share of an estate, Lot Nimdaba, registered as No. 75 in the Collectorate of Burdwan; and Krishnaprosonno Mozumdar and another were the zemindars of the remaining small share, 16 gandas 1 cowrie. The total revenue payable to the

(1) 14 W. R., 435. (2) 21 W. R., 367.

Collector in respect of the estate was Rs. 8,807 4 annas 11 gandas. Of this, Rs. 8,356 9 annas 11 gandas represented the plaintiff's share, and Rs. 450 11 annas was the share of Krishnaprosonno Mozumdar, &c. And the plaintiff states in the plaint that he was entrusted with the payment of the whole revenue as well what was due in respect of his own share of the zemindari and his own share of the putni, as what was due in respect of the share of Krishnaprosonno Mozumdar, &c. The share of Krishnaprosonno Mozumdar, &c., having been attached and sold in execution of the decree of a Civil Court, one-half of it was purchased by the defendant Soudamini. Certain instalments of Government revenue having fallen due between the date of the execution sale and the date on which Soudamini's purchase was confirmed by the order of Court, they were paid by the plaintiff, who, in truth, was obliged to pay them in order to save the whole estate from being sold by the Collector. The question is, whether, as the sale to Soudamini was eventually confirmed, she is not now liable to refund to the plaintiff the sums so paid by him.

The defendant denies her liability in respect of any Government revenue which accrued due prior to the date of confirmation of her purchase.

In our opinion the sale having been confirmed, and the purchaser having obtained a certificate, the interest of the judgment-debtor must be held, for the purposes of this suit, to have ceased from the date of the sale and to have thus become vested in the purchaser. That being so, we think that the purchaser, the defendant Soudamini, must be deemed the person liable to pay the amount of Government revenue in question, and that, therefore, the plaintiff is entitled to recover from her the payments which he made on account of her share of the property amounting (after giving her credit for the Rs. 25 which she had paid) to Rs. 168-15½, with interest on that sum at the rate of 6 per cent. from the time or times when the payments were made.

The judgment of the lower Appellate Court will be altered accordingly, and the plaintiff, the appellant, will have the costs of this appeal.

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MARKBY, J.—I concur in thinking that, under the circumstances of this case, the appellant had a right to recover from the respondent the amount claimed in respect of the two payments of Government revenue made by the appellant for the January and March quarters of 1872.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, and Mr. Justice Markby.

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RAJENDRONATH MOOKHOPADHYA (ONE OF THE DEFENDANTS) *v.* BASSIDER RUHMAN KHONDKHAR AND ANOTHER (PLAINTIFFS).*

Landlord and Tenant—Notice to quit—Suit for Ejectment—Procedure.

A ryot whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice.

THIS case was referred to a Full Bench in the following order of reference (in which the facts sufficiently appear) by

MARKBY, J.—The facts of this case may be very shortly stated. The plaintiff was a cultivating ryot, not having (as far as appears) any right of occupancy and not holding for any specified term. In Jeyt, 1277, (13th May to 13th June, 1872), his landlord, without giving him any notice at all, put in a fresh tenant. In Pous, 1279, (14th December, 1872, to 12th January 1873), the plaintiff brought this suit to recover possession. The zemindar, who together with the in-coming tenant, defended the suit, alleged that the plaintiff had relinquished his tenure in 1276 (1869-1870). Both Courts have found that there was no relinquishment, and have given the plaintiff a decree.

In special appeal it is contended that the plaintiff had no title upon which he could recover possession. Of course, as against

* Special Appeal, No. 3205 of 1874, against a decree of the Officiating Subordinate Judge of Zilla Nuddea, dated the 22nd of September, 1874, affirming a decree of the Munsif of Kustea, dated the 30th of May, 1873.

any one but his own landlord, it is clear that the plaintiff had a title to recover possession; and even as against his own landlord, I should have thought that the plaintiff could have recovered possession. It is I think clear upon the authorities that he could not have been ejected without reasonable notice, and then only at the end of the year—*Bakranath Mandal* v. *Binodram Sen* (1) and *Janoo Mundur* v. *Brijo Singh* (2). And unless his tenancy has been put an end to by this present litigation, it is still subsisting.

This last point is the one upon which the doubt arises in consequence of a decision in *Hem Chunder Ghose* v. *Radha Pershad Paleet* (3). There the learned Judges, whilst recognizing the right of the tenant to a reasonable notice to quit, expiring at the end of the year, seem nevertheless to consider that the institution of a suit is itself a sufficient demand of possession for the purpose of maintaining the suit, and that the tenant's claim for a reasonable notice, expiring at the end of the year, will be satisfied by fixing such a date for giving up possession as will be fair towards himself.

If that be so, I do not think the plaintiff in the present case could recover possession; he would only be entitled to some compensation for having been ejected too soon.

But with very great deference, I cannot bring myself to think that the decision I have referred to is correct. I do not see how the landlord, who has not determined the tenancy by a proper notice, can recover in ejectment. Even in the case of a tenancy-at-will, it is necessary under English law that the will should be determined—*Doe d. Jacobs* v. *Philips* (4), where it was argued that the will was determined by bringing the action, but the Court held that it was not so. The case of a ryot whose tenancy can only be determined at the end of the year by a reasonable notice to quit is a much stronger one.

It seems to me impossible to consider such a ryot otherwise than as a tenant from year to year. I do not say that the incidents of the tenancy are precisely the same as those of a yearly

(1) 1 B. L. R., F. B., 25.
(2) 22 W. R., 548.
(3) 23 W. R., 440.
(4) 10 Q. B., 130.

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tenancy in England. But I cannot think that the ryot can be ejected without a proper notice to quit.

The case of *Hem Chunder Ghose* v. *Radha Pershad Paleet* (1) is based upon the decision in *Mahomed Rasid Khan Chowdhry* v. *Jadoo Mirdha* (2); but I am strongly disposed to think that the learned Judges did not there intend to lay down any proposition of law at all; I think that decision only carries out a suggestion made by the Court for the benefit of the parties and in order to avoid further litigation.

The question being one of great importance, I feel myself justified in referring to the Full Bench the question whether a ryot, whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit brought against him by his landlord dismissed on the ground that he has had no such notice, or whether in such a case the Court ought to give a decree in favor of the landlord, fixing a date for giving up possession, which shall be fair towards the tenant.

Babu *Bama Churn Banerjee*, for the appellant, contended, that a ryot without either right of occupancy, or under-lease, was liable to be ejected by the landlord without a notice to quit having been given. [MACPHERSON, J.—Reasonable notice is necessary—*Bakranath Mandal* v. *Binodram Sen* (3).] The form in which the case is referred raises the question whether or not the bringing of an action is sufficient notice, but that question does not arise here. This suit is not by a landlord against a tenant, but by a tenant suing to be restored to possession. [GARTH, C.J.—If the tenant is entitled to notice to quit, although he has been turned out, yet he has an interest in the land.] The suit, when it is instituted, is sufficient notice—*Hem Chunder Ghose* v. *Radha Pershad Paleet* (1). The procedure required by Beng. Act VIII, 1869, s. 53, does not contemplate a notice to quit in the English sense. [JACKSON, J.—S. 53 provides for execution of decrees.] Unless the tenant has a right of occupancy, he can have no protection at all except that provided

(1) 23 W. R., 440. (2) 20 W. R., 401.
(3) 1 B. L. R., F. B., 25.

by the Act. [GARTH, C.J.—It must be taken for granted that a notice to quit must be given: a reasonable notice at the end of the year—*Mahomed Rasid Khan Chowdhry* v. *Jadoo Mirdha* (1).] Notice is not a question of right, it may be given for the sake of convenience. When a landlord brings a suit, the only ground on which the tenant can defeat the landlord is by showing, by an underlease or by right of occupancy, a right of possession in the land. The tenant can only claim a sufficient time, and such time can be fixed by the Court.

Moulvie *Murhamut Hossein*, for the respondent, was not called upon.

The opinion of the Full Bench was delivered by

GARTH, C.J.—We are of opinion that, in the case of a ryot of the class specified in the question referred to us,—*i.e.*, a ryot whose tenancy can only be determined by a reasonable notice to quit expiring at the end of the year,—the ryot can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has had no such notice.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice R. C. Mitter.

NATHUNI MAHTON (DEFENDANT) *v.* MANRAJ MAHTON (PLAINTIFF).*

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Hindu Law—Mitakshara—Joint Family—Suit by one Member for a specific Share.

To a suit by one member of a Hindu joint family, living under the Mitakshara law, for a specific share of the joint family property, all the members of the family are necessary parties.

THIS was a suit for recovery of possession of a two-anna eight pie share in certain immoveable property.

* Regular Appeal, No. 26 of 1875, against a decree of Baboo Ram Prosaud, the Second Subordinate Judge of Zilla Patna, dated the 8th of October, 1874.

(1) 20 W. R., 401.

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The plaint stated that the property in question was acquired by the plaintiff's grandfather, who died leaving four sons, to whom the property descended in equal shares; that the plaintiff's father, the defendant Talawar, had two sons, and, on a private partition between them, Talawar took one-third of the four-anna share inherited by him, and his two sons each took a one-third share thereof; that in execution of a decree obtained by one Bhurrut Das, the right, title, and interest of Talawar was put up for sale, and purchased by the plaintiff out of his self-acquired funds; that, subsequently, the defendant Nathuni, in execution of a decree, which he alleged he had obtained against Talawar, advertised the property in dispute for sale as the property of Talawar, and, notwithstanding a claim thereto preferred by the plaintiff, the property was sold and purchased by the defendant Nathuni, who dispossessed the plaintiff. The plaintiff, accordingly, brought this suit, making Nathuni and Talawar defendants, for possession with mesne profits of his original one-third share and the one-third subsequently purchased by him. He alleged that the decree was obtained and the property brought to sale by the defendant Nathuni acting in collusion with Talawar, who had no power to alienate or encumber the property without legal necessity, which did not exist.

The plea of the defendant Nathuni, upon which the case was decided in the High Court, was contained in the 3rd paragraph of his written statement, and was to the following effect:—That the partition alleged by the plaintiff had never taken place, the family being still joint; and that the suit for a portion of the joint family property was not sustainable, all the members of the family not having been made parties.

The lower Court, whilst holding that the family was still joint, upon the authority of *Mahabeer Persad* v. *Ramyad Singh* (1), overruled the objection of the defendant as to the right of the plaintiff to maintain the suit, and awarded him a decree for a one-anna four pie share. The first defendant appealed to the High Court. The plaintiff objected by way of cross-appeal to the lower Court's finding as to the family being still joint.

(1) 12 B. L. R., 90.

Baboo *Kally Mohun Dass* for the appellant.

Baboo *Chunder Madhub Ghose* (Mr. *Sandel* with him) for the respondent.

The judgment of the Court was delivered by

GARTH, C.J. (who, after stating shortly the facts of the case and the finding of the lower Court, continued):—We think that, having regard to the evidence, the lower Court has rightly held that the family of the plaintiff is still joint, and that there has been no partition of the family property as alleged in the plaint.

That being so, it only remains for us to decide the question of law raised by the defendant, *viz.*, that the present suit is not maintainable, and should be dismissed upon that ground.

We think that this contention is well founded, and we find that the question has been settled by several authorities—*Rajaram Tewari* v. *Lachman Pershad* (1), *Sheo Churn Narain Sing* v. *Chukraree Pershad Narain Sing* (2), and *Cheyt Narain Sing* v. *Bunwaree Sing* (3).

The decision referred to by the lower Court does not support the view which the Subordinate Judge takes; in fact, it rather supports the contrary view, because it decides that one out of several members of a joint Hindu family is entitled to recover the whole of the joint property in a suit in which all the members are parties. It does not decide, as has been erroneously supposed by the lower Court, that a single member of a joint Hindu family governed by the Mitakshara law can recover a fractional share of the family property, which would on partition fall to his lot. That decision further points out the mode in which the joint property should be partitioned and the divided shares disposed of, but with that question we are not concerned in this case.

For the reasons given above, we think the plaintiff's suit should be dismissed, upon the ground that he, still being a member of a joint Hindu family, consisting of himself, his

(1) 4 B. L. R., A. C., 118. (2) 15 W. R., 436.
(3) 23 W. R., 395.

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father, and his brother, cannot maintain this suit for the recovery of a two-third share of the joint family property.

Upon this ground, the decree of the lower Court must be reversed with costs.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, and Mr. Justice Markby.

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DENOBUNDHOO CHOWDHRY (DEFENDANT) *v.* KRISTOMONEE DOSSEE (PLAINTIFF).*

Res-judicata—Act VIII of 1859, *s.* 2—*Former Suit to recover same Property on different grounds.*

Certain property, originally belonging to the husband of the plaintiff, was conveyed by him by deed of gift to his daughter, after her marriage with the defendant, as her stridhan. Some years after the daughter's death, the plaintiff brought a suit to recover the property, on the ground that the deed of gift was a forgery, and that she was entitled to the property as heiress of her husband; but her suit was dismissed, the deed of gift being found to be genuine. In a suit subsequently brought to recover the same property, on the ground that the plaintiff was heiress of her daughter, *held* by the majority of a Full Bench (GARTH, C.J., dissenting) that the suit was barred.

THIS case was referred by GARTH, C.J., and BIRCH, J., to a Full Bench in the following order of reference :—

GARTH, C.J.—In this case the plaintiff sues to establish her right to certain land as heiress of her daughter, the deceased wife of the defendant Denobundhoo, and the facts were as follows :—

The property in question originally belonged to the plaintiff's husband, and, some time after the marriage of their daughter, *viz.*, in the year 1262 (1855), the plaintiff's husband conveyed this property by deed of gift to the daughter as her stridhan. The

* Special Appeal, No. 373 of 1875, against a decree of Baboo Obhoy Churn Roy, the Subordinate Judge of Zilla Rungpore, dated the 4th of December, 1874, reversing a decree of Baboo Mothoora Lall Roy, the Munsif of Badiakhalee, dated the 19th of March, 1874.

daughter died in the year 1268 (1861), and, some eight years after her death, the plaintiff claimed and brought a suit to recover this property, upon the ground that the deed of gift was a forgery, and that she was entitled to the property as heiress to her husband. In that suit it was decided, that the deed of gift was genuine and valid, and consequently the plaintiff's suit was dismissed. The plaintiff then brought the present suit, claiming the property as heiress of her daughter, and the answer which the defendant makes to her claim is twofold: 1*st*, that she is estopped or otherwise legally prevented from bringing this suit by the judgment in the former suit, inasmuch as she is seeking to recover the self-same property, although by a different right, which she claimed in the former suit; and 2*nd*, that, under the circumstances, the defendant, as the husband of the plaintiff's daughter, is entitled to the property as the heir of his deceased wife, and that the plaintiff has no claim to it as heiress to her daughter.

Upon both these points, there are conflicting decisions in this Court.

As regards the first point, the case of *Nufur Chunder Pal Chowdhry* v. *Luckhee Monee Dabee* (1) decides, that a party who brings a suit to recover land under one title, and is defeated, is barred from recovering that same land in another suit, though by a different title; and the case of *Aughore Nath Ghosal* v. *Roop Chand Mundul* (2) appears to decide that, under somewhat similar circumstances, a party may bring a second suit, though defeated in the first, if he claims by a different title.

As regards the second point, the case of *Judoonath Sircar* v. *Bussunt Coomar Roy Chowdhry* (3) decided, that the daughter's husband was entitled as his wife's heir to succeed to her stridhan in preference to her brother or mother, and in the same case on review (4) it was held by two other learned Judges, that the mother, and not the husband, is the preferential heir.

(1) 9 W. R., 300.
(2) 13 W. R., 97.
(3) 11 B. L. R., 286, at p. 287.
(4) *Id.*, 295.

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The following questions, therefore, are referred to a Full Bench for decision:

1. Whether a plaintiff, who has brought a suit to recover property upon the strength of one title, and has been defeated in that suit, can bring a suit to recover the same property upon the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed?

2. Whether, under the Hindu law of the Bengal school, a husband is the preferential heir to the stridhan of his wife given to her after marriage by her father, such wife dying without issue, and having a mother her surviving? (1)

Baboo *Bhuggobutty Churn Ghose*, for the appellant, contended, that the plaintiff had lost her right by any title, existing at the time of the institution of the first suit, which was not then urged—*Shib Shunkur Neogy* v. *Huro Soonduree Goopta* (2). She was bound to disclose her titles at once; the cause of action is a very different thing to the title—*Brojo Lall Roy* v. *Khettur Nath Mitter* (3); see also *Aunungo Mohun Deb Roy* v. *Unnoda Dossee* (4). A plaintiff is debarred from suing to recover possession of land claiming it as part of a talook, after having previously sued unsuccessfully to recover possession of the same land claiming it as a *towfir* (or excess)—*Umatara Debi* v. *Krishna Kamini Dasi* (5), the judgment in which case was upheld by the Privy Council (6). [GARTH, C.J.—In that case the claim was as a talukdar in both suits, and the evidence in both exactly the same, so that it was not on two titles that the suits were brought.] In each case the character of the land had to be proved. The fact of the plaintiff in that suit being kept out of possession, gave a cause of action in both suits. The cause of action here was the alleged wrongful withholding of the land. A plaintiff is bound to include in his suit all the existing grounds

(1) The point raised by this question was abandoned by the appellant in argument.

(2) 13 W. R., 209.

(3) 12 W. R., 55.

(4) 17 W. R., 351.

(5) 2 B. L. R., A. C., 102.

(6) 11 B. L. R., 158.

against the validity of a sale, and is not allowed to bring a second suit to show additional grounds—*Abhiram Doss* v. *Sriram Doss* (1). [GARTH, C.J.—In all these cases it has been taken that the title is no part of the cause of action. I do not agree with that.] A suit, claiming property by a title on inheritance, is barred by ss. 2 and 7, Civil Procedure Code, where a claim on a title derived by gift has been already adjudicated—*Dudsar Bibee* v. *Shakir Burkundaz* (2). [GARTH, C.J.—It seems to me that in a country like this, where, as in the mofussil, good advice may not be always available, a person may not claim a property in the proper manner.]

Baboo *Grija Sunker Mozoomdar* for the respondent.—The plaintiff could not have raised the alternative claim in the first suit: the claims would have been contradictory. [JACKSON, J.—It might have been made in the lower Court, though perhaps not in special appeal.] The cause of action is not the same in both suits: in the first suit it accrued when the husband died; in the second, when the daughter died. The right to the property accrued at different times, although the daughter had died before the institution of the first suit. The rule of law applicable to the defence of *res judicata* in bar of a suit is not only when the same property or subject of demand is in dispute; but it must also appear that the identical question of right or title had been *in judicio*—*Chinniya Mudali* v. *Venkatachella Pillai* (3). It is not compulsory on the plaintiff to join all his causes of action in one suit—s. 8, Civil Procedure Code. A claim on deed of gift having been defeated, does not estop a claim of inheritance—*Jugdissoree Debea* v. *Kaleechunder Lahoree* (4). It is a mistake to suppose that s. 2, Act VIII of 1859, applies to the present suit. The land sued for may be the same, but there is no identity of cause of action in the two suits. A suit to recover rent against a tenant, and a suit to recover possession against the same tenant as a trespasser, are not for the same cause of action—*Kadir Buksh* v. *Golam Ali* (5); nor is a suit

(1) 3 B. L. R., A. C., 421.
(2) 15 W. R., 168.
(3) 3 Mad. H. C. Rep., 320.
(4) S. D. A., 1855, 446.
(5) 9 W. R., 90.

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to enhance rent on the same cause of action as one to recover arrears of rent—*Soorasoonderee Dabea* v. *Golam Ally* (1).

The following cases were also cited and distinguished:—*Soorjomonee Dayee* v. *Suddanund Mohopatter* (2), *Woomatara Debia* v. *Unnopoorna Dassee* (3), *Srimut Rajah Moottoo Vijaya Raganadha Bodha Gooroo Sawmy Periya Odaya Taver* v. *Katama Natchiar* (4).

Baboo *Bhuggobutty Churn Ghose* in reply.—The case of *Chinniya Mudali* v. *Venkatachella Pillai* (5) is disposed of by *Kashee Kishore Roy Chowdry* v. *Kristo Chunder Sandyal Chowdhry* (6).

The following opinions were delivered by the Full Bench:—

GARTH, C.J.—In this case I have the misfortune to differ in opinion from my learned colleagues. The question which we have to decide is, whether the plaintiff in this suit is barred by the judgment in a former suit. It is said that she is so barred by the second section of the Civil Procedure Code, which enacts, "that the Civil Courts shall not take cognizance of any suit brought on a 'cause of action' which has been heard and determined by a Court of competent jurisdiction, in a former suit between the same parties."

Is then the "cause of action" in the present suit the same cause of action which was adjudicated upon in the former suit? This depends upon what is meant by the words "cause of action," and I believe it has never been seriously doubted, either here or in England, that the true meaning of that expression is not the claim itself, as for instance, the money, or goods, or land, which the plaintiff seeks to recover, but the grounds upon which that claim is founded. For authorities upon this point in England, see *Jackson* v. *Spittal* (7), *Durham* v. *Spence* (8), and the cases cited in Day's Common Law Procedure Act, 47 and following pages. It seems clear from other sections of the Civil Procedure Code, that this is the sense in which the framers of that Act intended to use the phrase. The 7th

(1) 15 B. L. R., 125, note.
(2) 12 B. L. R., 304.
(3) 11 B. L. R., 158.
(4) 11 Moore's I. A., 50.
(5) 3 Mad. H. C. Rep., 320.
(6) 22 W. R., 464.
(7) L. R., 5 C. P., 542.
(8) L. R., 6 Exch., 46.

section of the Code enacts, that "every suit shall include the whole of the claim arising out of the cause of action," treating the claim as one thing, and the cause of action as another, and obviously meaning this—that if, for example, the plaintiff's claim is Rs. 500 founded upon a bond (the Rs. 500 being his claim, and the bond and the breach of the condition of the bond being his cause of action) he shall not divide his claim, and sue for part of the Rs. 500 in one suit, and for part in another. And so in the case of land, if a man claims an estate upon the ground that he is heir to his father (the estate being his claim, and his title by inheritance being his cause of action) he is not to be allowed to claim a portion of that estate in one suit, and the remainder in another suit.

If then the true meaning of the words "cause of action" is the ground upon which the plaintiff's suit is founded in each particular case, it will be found that the rule which is laid down in s. 2 of the Civil Procedure Code is really the same (so far as plaintiffs are concerned), and has the same force and effect as the rule of "*res judicata*," as it has always been recognized and acted upon in England and in other countries in Europe where the civil law obtains.

According to that rule, in order to make an adjudication in one suit a bar to the plaintiff's proceeding in another, it must be shown: 1*st*, that the parties in both suits are the same; 2*ndly*, that the thing sought to be recovered is the same; 3*rdly*, that the grounds upon which the claim is founded are the same; and 4*thly*, that the character in which the parties sue or are sued is the same. This is the law established in England by a long current of authorities, which will be found collected in the notes to *The Duchess of Kingston's case* (1) and in 2 Phillips on Evidence, 16th and following pages.

The rule of the civil law to the same effect, adopted generally by the English as well as the Civil Courts, is thus stated by Vinnius, whom Lord Chancellor Westbury quotes in the case of *Hunter* v. *Stewart* (2) (to which I shall presently refer) as being the best exposition of the civil law upon the subject.

(1) 2 Smith's L. C., 695 *et seqq.* (2) 31 L. J., Ch., 346.

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"*Exceptio rei judicatæ non aliter agenti obstat, quam si eadem quæstio inter easdem personas revocetur. Itaque, ita demum nocet, si omnia sint eadem, idem corpus, eadem quantitas, idem jus, eadem causa petendi, eademque conditio personarum.*" It is not enough that the parties and the subject of the suit should be the same, but also that the ground or right upon which the plaintiff's claim is founded should also be substantially the same. By using the word "substantially," I desire to exclude the supposition that a plaintiff may evade the application of the rule, merely by varying his form of pleading, or by describing the subject-matter of his suit, or expressing his rights, in different language. If the self-same question of right or cause of action has been in substance heard and decided between the same parties, no matter what the form or language of the pleadings may be, the decision is conclusive between them. It is especially necessary to bear this last consideration in mind, because I believe it will be found that much apparent contrariety of opinion in the authorities may be explained by a careful attention to this point.

Let us now proceed to examine the facts of the present case.

In the first suit the plaintiff (a widow) sued to recover certain land which once belonged to her husband, upon the ground that she was *his heir*. She and her husband had had one child only, a daughter, who was dead, and that daughter's husband was the defendant in the suit; and he claimed the property on the ground that the plaintiff's husband had, in his lifetime, after the daughter's marriage, conveyed it by deed to the daughter, and that he, the defendant, was the daughter's heir. The plaintiff's case was that the deed under which the defendant claimed was a forgery; and the sole question raised and determined in that case was as to the validity of this deed. The deed was found to be genuine, and the plaintiff's suit was consequently dismissed.

The plaintiff then brought the present suit, founded upon the fact that the deed, having been held valid, passed the property to the daughter, and that she (the plaintiff), and not the defendant, was her daughter's heir. Whether or no she was right in this, depended upon a doubtful question of Hindu law,

which was decided differently by two different Benches of the High Court: Norman and Loch, JJ., deciding first that the daughter's husband was the heir; and Louis Jackson and Mitter, JJ., deciding on review that the mother was the daughter's heir. It should be specially noted that this question, upon which the merits of the second suit entirely depended, was never raised in the first suit. The first suit was to establish the plaintiff's title as heir to her husband, by invalidating the conveyance to the daughter. The second suit was to establish the plaintiff's title as heir to her daughter through the medium of that very deed. It should also be noted, and it will be found extremely important, when we come to examine presently the decisions of the Privy Council, that in these cases the plaintiff had never been in possession of the land in dispute, and that, consequently, she was not suing for any dispossession by the defendant. She was seeking to establish her title to land which she had never possessed, and consequently she was bound, as I conceive, and as I shall explain more at length presently, to state in her plaint what her title was.

It is obvious that the only question raised in the second suit was not (in the words of s. 2) heard or determined in the first suit, and that if, under these circumstances, we are compelled to decide this case in the defendant's favor, we shall be depriving the plaintiff of what is manifestly her right. Still, if law and authority oblige us so to decide, we are of course bound by law and authority whatever may be the right of the parties in this particular suit.

The defendant contends, as I understand, that the cause of action in both cases was the same, because both suits were to recover the same land, of which the defendant was alleged to be in wrongful possession, and that the fact of the plaintiff in the one suit claiming under a totally different title from that on which she relied in the other suit makes no difference. The justice of this contention seems to me to depend upon the question which I have already discussed, *viz.*, what the cause of action really was, and whether the statement of the plaintiff's title in each suit formed a material part of her cause of action.

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The solution of this question will, I think, be materially assisted by a reference to the 26th section of the Civil Procedure Code, which directs what statements the plaint shall contain. It is to contain the relief sought for, the subject of the claim, and the cause of action (here again treating the cause of action as a different thing from the claim), and then, in the instance given under paragraph 4 of the same section, it is said: "If the suit be for an estate, the plaint should ask for possession of the estate, of which the plaintiff was dispossessed by the defendant, on the —— day of —— or to which the plaintiff became entitled by inheritance or gift; or purchase or otherwise, as the case may be, on or about the —— day of ——."

These instances or examples will be found to comprise two distinct classes of suits: 1*st*, those which might be the subject of an action of trespass in England, where the plaintiff had been once in possession and has since been wrongfully dispossessed by the defendant, and in which it is unnecessary to state specifically in the plaint the nature of the plaintiff's title, because his possessory right is sufficient to enable him to maintain the suit; and 2*ndly*, cases where the plaintiff never has been in possession, and where consequently he cannot rely upon his possessory right, but must state the grounds or title upon which his claim is founded, as by purchase, or by gift, or by inheritance, as the case may be. In these cases, a plaintiff could not have sued in trespass in England, nor could he have relied upon his possessory title, because he never had a possession (see *Litchfield* v. *Ready* (1), *Turner* v. *Cameron's Steam Coal Company* (2), and the cases cited in Bullen and Leake, 359), and consequently the Code requires, as I read it, that in these cases, the plaintiff shall state what his ground of claim is, and that ground of claim, whether it be by right of inheritance or purchase, or otherwise, forms his cause of action, and is a material portion of the plaint. It seems difficult to explain the 26th section of the Code and the examples which are given in any other way.

(1) 5 Exch., 939. (2) *Id.*, 932.

In this case, therefore, the plaintiff, never having been in possession of the land in question, was bound to state her ground of claim to it, and she did so in the first suit by claiming as heir to her husband. Having made her claim on this ground, if at the trial she had proceeded upon some other ground, as for instance, that she had purchased the estate from a stranger, the Court, in my opinion, ought to have refused to hear her upon it, because she would then have been proceeding upon a cause of action materially different from that disclosed in the plaint, and which the defendant did not come to trial prepared to contest. If, therefore, the plaintiff's title as heir to her husband was her cause of action in the first suit, how can it possibly be said that the second suit, which was founded on an entirely different title, *viz.*, as heir to his daughter, and upon a different state of facts, was upon the same cause of action as the first?

But then it is further argued by the defendant, that if the cause of action in the second suit was not included in the first, it ought to have been; and that the plaintiff was bound to bring forward in her plaint any ground or title upon which she could possibly have claimed the property at the date of the first suit. My answer to this contention is, that there is no law that I know of which obliges the plaintiff to do this; and that, in the absence of any such law, the Court has no right or power to impose such an obligation upon a suitor.

The 2nd section of the Civil Procedure Code does not lay down any rule of the kind, unless indeed the words "cause of action" are intended to have a very different meaning from that which I attribute to them. If in every case where land is sought to be recovered, the cause of action is merely that the plaintiff is entitled to possession (no matter by what right he claims, or whether he ever has or has not been previously in possession of it), the defendant's contention may be right. But then it is difficult to see why the 26th section of the Civil Procedure Code should require the plaintiff to state his title or ground of claim in his plaint. The examples given in section 26th would seem in that case to be only misleading and superfluous.

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I have already explained that such is not my view of the section; and if it were the true one, I can see that, in very many instances, it might be productive of great injustice and inconvenience. Suppose, for example, that A sues X to recover land, upon the ground that it belonged to B, and that he, A, is B's son and heir. The answer of X is, that A is not the legitimate son of B, and A is defeated upon that ground. A then brings another suit against X, in which he claims a portion of the same property, setting up a will of B, by which he divided the property in equal shares to his two illegitimate children, A claiming to be one of those children. The defence is, that A is barred by the adjudication in the former suit. Now, if A was bound to bring forward in the first suit every ground of claim which he had to any part of the property in question, then no doubt he would be barred in the second suit. But surely it would be highly unjust and inconvenient that he should be obliged to set up in one and the same suit two distinctly conflicting claims. The first suit being founded on the contention, that he was A's legitimate son, his evidence in that suit would, of course, be directed to that contention. If he were to be compelled in that same suit to bring forward his other claim, and to show by other evidence that he was the illegitimate son mentioned in the will, it is obvious that he would be placed in a most difficult and unfair position. Again take another instance: A brings a suit for land against X, claiming as heir to his father. He is defeated on the ground that the property was his uncle's, and not his father's. At the time this suit was brought, his uncle was in fact dead, though A did not know it. He then brings a suit against X, as heir to his uncle. Is the previous adjudication a bar? If the cause of action in both actions is that A is entitled to the land, no matter how or why, A is, no doubt, barred, because the second section makes no exception in favor of persons who are not aware of their rights, and Courts of law have no power to import such an exception into the section. If the cause of action in the second suit is really the same as in the first, it is no less the same because the plaintiff when he brought the first suit was not aware of the other title upon which he relied in his second suit. The section says nothing either as to the plaintiff's know-

ledge of his rights, or as to the time when those rights accrued, and, therefore, if the defendant's contention is correct, a man who has once brought his suit to recover an estate and failed, has exhausted his whole cause of action in respect of that estate, not only all his grounds of claim which he may then have, and of which he may not be aware, but also, if the argument of the defendant is right, every other ground of claim to which he may become entitled in the future. It is impossible, as it seems to me, that this can be the real meaning of the section.

I now come to deal with the authorities; and I am aware of course that not only in this Court, but in the other High Courts of this country, the question now under consideration has been frequently discussed, and that there are conflicting decisions upon it. So far as this Court is concerned, I consider that those decisions are now under review, and, therefore, with great respect for the authors of them, I shall abstain from noticing more than one or two cases; but I will refer to some other high authorities, which I consider particularly deserving of attention; and more especially, to certain judgments in the Privy Council, which it is said compel us in this instance to decide in favor of the defendant.

The first case to which I shall refer is *Chinniya Mudali* v. *Venkatachellai Pillai* (1).

In that case the plaintiff sued to set aside the sale of a village which had been made by his grandfather (so far as concerned his, the plaintiff's, share in that village), upon the ground that the grandfather had made the sale without his (the plaintiff's) consent, and not for any family purposes. One answer to this claim was, that the plaintiff was barred by a previous adjudication in another suit. Two other suits had in fact been brought some years before; the first by the plaintiff's father against the father of the defendant, to set aside the same deed, upon the ground that the grandfather, when he made it, was imbecile, and that the sale was without the plaintiff's father's consent. This suit was decided against the then plaintiff on the ground that the grandfather, when he made the deed, was not imbecile,

(1) 3 Mad. H. C. Rep., 320.

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and the Judge distinctly refused to decide the case upon any other ground. In 1862 the plaintiff again sued the defendant on the same ground as his father had proceeded, and that suit was dismissed, because it was *res judicata*. It was then contended that the third suit was founded on an entirely different cause of action, not heard or adjudicated upon in either of the former suits, inasmuch as it impugned the validity of the deed, not on account of the imbecility of the grandfather, but on the ground that the sale was without the plaintiff's consent and not for family purposes: and the Court (Scotland, C.J., and Holloway, J.) were of that opinion. They held, that although the Judge in the first of the former suits might have adjudicated upon the subject of the third suit, he advisedly and distinctly refused to do so, and consequently that the cause of action in the third suit had not been heard or adjudicated upon in the first. A very learned judgment was delivered by Scotland, C.J., and Holloway, J., in that case, in which the principles of the law, and especially of the civil law upon the subject, are very clearly explained.

Another well-known case in England to the same effect was decided by Lord Chancellor Westbury in the year 1868—*Hunter* v. *Stewart* (1). In that case the plaintiff had filed a bill in the Supreme Court of Sydney in the year 1843, claiming to be admitted as a shareholder in a Loan and Banking Company upon certain grounds set forth in the bill, and this suit was decided against him. He subsequently filed his bill in England to obtain similar relief, but his claim was founded upon different grounds and equities from those upon which he relied in his former suit, although he might, if he had pleased, have relied upon them in that suit. The Lord Chancellor held notwithstanding that the suit was not barred. His Lordship says:—"It is indeed true, that the case made by the second bill must be taken to have been known to the plaintiff at the time of the institution of the first, and might have been then brought forward; and it may be said, therefore, that it ought not now to be entertained; but I find no authority for this

(1) 31 L. J., Ch., 346.

position in civil suits, and no case was cited at the bar, nor have I been able to find any in which a decree of dismissal of a former bill has been treated as a bar to a new suit, asking the same relief, but stating a different case, giving rise to a different equity." That case has never, as far as I know, been overruled, and it is, undoubtedly, a very strong authority in favor of the present plaintiff.

I now come to the cases in the Privy Council, which are said to be at variance with the plaintiff's contention. The first of these is *Srimut Rajah Moottoo Vijaya Raganada Bodha Gooroo* v. *Katama Natchiar* (1). In that case suits had been brought in the year 1832 to recover possession of a zemindary, and one of the principal questions was, whether the zemindary was a divided or an undivided estate; one of the parties (A) claimed under an alleged will of the zemindar last seized. The Courts in this country decided against the validity of the will, and, upon appeal to the Privy Council in 1844, their Lordships considered that the question whether the property was a divided or undivided estate was a very important one, and had not been properly tried; they, therefore, remitted the case to India, giving liberty to the parties to bring a fresh suit for the purpose of trying that question. Fresh suits were, accordingly, brought in this country, and in those suits A again claimed the zemindary under the alleged will made by the late zemindar; though at the trial he rested his case rather on the ground of the property being undivided than upon his claim under the will. Upon this suit being appealed to the Privy Council, A's Counsel distinctly and advisedly gave up all claim under the will, admitting that he did not intend to treat it as a will at all, and resting his case entirely upon other grounds. A, being defeated in these suits, instituted a fresh suit in this country for the purpose of establishing the validity of the very will upon which he had founded his claim in both the two former suits, and which he had afterwards expressly renounced by his Counsel in the second suit; and the Courts here held that he was barred by the judgment

(1) 11 Moore's I. A., 50.

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in the former suit from making this fresh claim. He then appealed to the Privy Council in 1866, and their Lordships decided, that as in the former suit the plaintiff had distinctly put forward his claim upon the will, and then abandoned it, the abandonment must be considered as conclusively binding upon him, as if the Court had actually decided against the validity of the will, and that in attempting again to enforce his claim under the will he was proceeding to enforce a cause of action which had already been put forward in a former suit and disposed of. There is nothing in that decision, as it seems to me, which conflicts in any way with the opinion which I entertain in the present case. The will upon which the plaintiff's suit was founded had been made the actual subject of claim in the previous suit, and it was no less adjudicated upon in that suit, because the plaintiff by his Counsel chose to renounce it.

Then comes the very important case of *Woomatara Debia* v. *Unnopoorna Dassee* (1). In that case certain disputes had arisen in this country between the plaintiff and other persons on the one hand, and the defendants on the other, as to the boundaries of certain parcels of lands: and these disputes became the subject of proceedings (1st) before the Deputy Collector, (2nd) before the Superintendent of surveys, and lastly, before the Revenue Commissioner, who made an order as to the boundaries, which, as the plaintiff contended, deprived her of upwards of 3,000 bighas of land, to which she was entitled. The defendants, accordingly, took possession of this land from the plaintiff, and the plaintiff then brought a regular suit against the defendants to recover it back, alleging that they had dispossessed her of the property. In that suit she described the land of which she had thus been dispossessed as *towfir* land, and upon the suit being tried the plaintiff was defeated. She then brought another suit to recover the self-same land from the defendants, alleging a dispossession precisely as before, but describing the land in her plaint as belonging to her ancient talook. The Principal Sudder Ameen upon

(1) 11 B. L. R., 158.

the trial came to the conclusion that the plaintiff was making in substance precisely the same claim as she had made in the former suit, and considered that she was, therefore, barred. The plaintiff then appealed to the High Court, and the appeal was heard by Phear and Hobhouse, JJ., who dismissed it upon the same ground (1). Phear, J., in his judgment says:—"In both suits they sought to recover from the defendants the same land, on the ground that it was wrongfully held from her by the defendants; and the wrong-doing of the defendants was in the one suit the same act or series of acts as in the other." The case then came on before the Privy Council, and was heard in 1872, when their Lordships affirmed the decision of this Court, considering that the case was barred by s. 2 of the Civil Procedure Code. It was argued in that case, that the plaintiff, in the first suit, made her claim upon an entirely different title from that which she put forward in the second suit; but their Lordships' judgment, as I understand it, distinctly proceeds upon the ground that the cause of action in that case had nothing to do with title: that she was in fact setting up precisely the same right in the one case as in the other, and that the allegation of diversity of title was merely a shift for the purpose of endeavouring to try the same question over again under another phase. Their Lordships say:—"The first question which occurs to their Lordships (upon s. 2 of the Civil Procedure Code) is, what is meant by the 'cause of action;' and, in the present case, they are clearly of opinion that the cause of action in both suits was the disposesession of the appellant by the fixing of the boundary which is now complained of, and the other proceedings which culminated in the decision of the Judge in the Act IV case." Their Lordships then go on to say:—"Nor does it appear to their Lordships necessary to decide whether, in some of the cases put by Mr. Doyne (the Counsel for the plaintiff), where the party was suing entirely under a new and different title, such a distinction as he contended for might not be taken; because here it seems clear to their Lordships that the

(1) 2 B. L. R., A. C., 102.

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matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired; and it is perfectly clear upon the proceedings in the earlier suit, that her right in any way to this land was capable of being therein determined. The Court in that suit seems almost to have considered that the title now sued upon had been put forward, and could not prevail; and that, if the talookdar had any title at all, it was by way of *towfir*. The Court of appeal, proceeding on the admission of the plaintiff that the whole of the originally settled talook was in her possession, and that all she had been dispossessed of was claimed by her only as *towfir* lands, dealt with that claim; but it is perfectly clear that if the plaintiff had chosen to put forward the other title in the way that I have suggested, the Court could have dealt with the whole question and considered it; that question being in point of fact a mere question of quantity and boundary, and whether the plaintiff was in any way entitled to recover the land sued for from the defendants, who are the defendants also in the present suit."

I certainly do not understand from this judgment that their Lordships intended to lay down any rule such as is now contended for by the defendant. Indeed they appear to me to guard themselves most carefully against doing so. That case was precisely one of those which I have already described, which might have been made the subject of an action of trespass in England, and in which it would have been quite sufficient for the plaintiff, under cl. 4, s. 26 of the Civil Procedure Code, to have merely alleged in her plaint that she had been dispossessed of her estate by the defendants, without stating how or by what title she had acquired that estate. Having once been in possession, she was entitled to stand upon her possessory right, and to sue the defendants for a wrongful dispossession; and their Lordships say expressly at the outset of their judgment, that they consider the plaintiff's cause of action in that particular suit to have been her dispossession. That case, therefore, in my opinion, does not govern the present, which, as I have already explained,

comes under a different class of suits, in which the plaintiff could not rely upon her possessory right, but was bound to show by what other right or title she claimed the land in dispute.

This is in fact one of those very cases, as it seems to me, in which the question to be tried was not dispossession but of substantive title, and which their Lordships in the Privy Council especially except from the operation of their judgment. It is true, that in one passage they appear to adopt the judgment of Phear, J., in the High Court, and Phear, J., does undoubtedly use expressions apparently laying down the rule for which the defendant contends as applicable to all cases; but I consider that those expressions of Phear, J., even though confirmed by the Privy Council, were extra-judicial, or at any rate can only be considered as an authority with reference to the particular case or class of cases which was then *sub judicio.*

The only other authority which I think it necessary to notice, is that of *Kashee Kishore Roy Chowdhry* v. *Kristo Chunder Sandyal Chowdhry* (1). The plaintiffs in that case had, in a former suit, laid claim to the land in dispute as being an accretion to an estate of theirs called Mouzah Rughoorampore. In that suit they were defeated; and they then brought a second suit for the same land, describing it as an accretion to another estate called Mouzah Lukhichur, and the Court (Sir R. Couch, C.J., and Ainslie, J.) decided that the plaintiffs were barred. They considered that the case was not distinguishable from that in the Privy Council, *Woomatara Debia* v. *Unnopoorna Dassee* (2), to which I have just referred; and I perfectly agree with them. The plaintiffs in that suit were not relying upon a different title from that which they set up in their former suit. In both suits they claimed the land in question as an accretion to other land, which was their undisputed property, and whether they claimed it as an accretion to one estate or another, or to one village or another, or to one field or another, they were in each case claiming it as an accretion to land of which they were confessedly in possession. The difference between the two suits was merely matter of description, not of title. This case, there-

(1) 22 W. R., 464. (2) 11 B. L. R., 158.

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fore, as it seems to me, is also clearly distinguishable from the present; and the main reason why I notice it is, that the learned Judges in that case appear to have misapprehended an important passage of the very excellent judgment of Holloway, J., in *Chinnniya Mudali* v. *Venkatachella Pillai* (1), to which I have referred. Sir Richard Couch apparently considers, that Holloway, J. was guilty of some inconsistency in quoting as an authority in one passage a doctrine which he distinctly contradicts in another passage, whereas upon reference to the report, pp. 329 and 330. it will be found, that Holloway, J., is there taking considerable pains to explain what he calls the *untenable* position which had been once held by certain of the civilian jurists, *viz.*, that "every possible claim to a particular subject-matter is exhausted by that claim having been once agitated." Holloway, J., then quotes the texts which induced this misconception of the law; and he points out the distinction which was always observed in actions *in rem*, (even during the time when that "untenable position" was upheld by some jurists) between those cases where a plaintiff made his claim without specifying any ground upon which he made it, and other cases where his claim was founded upon some particular title. In the first class of cases, he was barred by the judgment from bringing any other suit, in the last class he might always bring a new suit founded on a different title. Holloway, J., explains how this doctrine of the Roman law, which he shows to be untenable, disappeared in the time of Diocletian, after the abolition of the order of *judices*, and that since that time the accepted rule of the civil law has always been as he had previously described it in the earlier part of his judgment.

As far as I can see, therefore, neither of the decisions in the Privy Council, nor the last authority to which I have alluded in this Court, militate in any degree against the view which I have taken of the present case. That view is supported, as it seems to me, not only by the provisions of the Civil Procedure Code itself, but by a long current of authorities in England, and

(1) 3 Mad. H. C. Rep., 329.

by the rule of the civil law as laid down by the most eminent jurists. On the other hand, the construction which some of my learned brothers are disposed to put upon the provisions of s. 2, and the review which they take of the law as laid down by the Privy Council, is not only, as I consider, at variance with the highest authorities, but I fear it will be productive in a large number of cases, as it undoubtedly must be in this, of great injustice.

The state of the law in India upon the subject of land tenures and inheritance is exceedingly difficult and complicated. It is quite impossible that the great mass of the people can properly comprehend its details; and it must constantly happen, that, until the differences between contending parties have been ventilated and discussed in a Court of law, the litigants themselves are entirely ignorant of what their legal rights and position may be. I do not believe that the Legislature of this country, nor the Lords of the Privy Council, in interpreting the language of the Legislature, ever intended to impose upon a people, who are for the most part uneducated and imperfectly advised, a more stringent rule upon this difficult subject than has obtained for centuries past in civilized Europe.

I desire to add, that I make these observations with every respect for the views of my learned colleagues, and with sincere regret that there should be any difference of opinion amongst us upon such an important question.

KEMP, J.—This case has been referred by the Chief Justice and Mr. Justice Birch with the following question:—

"Whether a plaintiff who has brought a suit to recover property upon the strength of one title, and has been defeated in that suit, can bring a suit to recover the same property upon the strength of another title, of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed?"

Another question was referred for our opinion, but as it has been abandoned in argument on the part of the defendant, appellant, it is unnecessary to allude to it.

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The plaintiff, respondent, sues as heiress of her daughter, Parbutty Dassee, claiming three jotes. It appears that the late Anund Narain Sircar, the husband of the plaintiff, a few days after the marriage of his daughter, Parbutty Dassee, with the defendant Denobundhoo, conveyed by deed of gift, dated the 18th of Bysakh, 1262 B.S., to his daughter the three jotes, the subject of the present suit. The donee Parbutty died first, and then the donor the aforesaid, Anund Narain Sircar. He left a widow, the plaintiff. It is alleged in the plaint that, after the death of Anund Narain and his daughter, the three jotes were held by Denobundhoo, the defendant, who sued for the recovery of the rents thereof. The plaintiff intervened, but was defeated in the rent-suit. She then sued some years—about eight years—after the succession opened out to her, alleging that the deed of gift was a forgery. That suit was for two out of the three jotes, omitting all claim to the third jote situated in Mouzah Doorgapore. In that suit it was held that the deed of gift was valid, and the plaintiff's suit was dismissed. She brings the present suit within a few days of the period of limitation, dating from the death of her daughter Parbutty, claiming the three jotes as heiress to her daughter.

The defendant Denobundhoo, the son-in-law, contends that the suit is barred under the statute of limitation; that it is barred under s. 2 of Act VIII of 1859, as also, with reference to jote No. 3 in Mouzah Doorgapore, under s. 7 of Act VIII of 1859, and on the merits, that he and his son by another marriage are, under the Hindu law, the preferential heirs to the estate of Parbutty Dassee.

Both the lower Courts have held that the suit of the plaintiff is in time; as it has been instituted within twelve years from the date of the death of Parbutty Dassee; that it is not barred under s. 2 of Act VIII of 1859, or under s. 7 of the same Act, with reference to the claim for possession of the jote in Doorgapore. On the merits it was held that the plaintiff was the preferential heiress to her daughter's stridhan.

I am of opinion that the plaintiff's suit is barred under s. 2 of Act VIII of 1859. Her cause of action in her first suit,

and which obliged her to seek the aid of the Court, was that she alleged that she had been wrongfully deprived of possession of land which she was entitled to have. She had to make out a title to possession such as to prevail against the defendant. It is true that the title set up in the present suit is different from the title set up in the former suit; but the cause of action is not, in my opinion, changed within the meaning of s. 2 of Act VIII of 1859. The title she now sues upon was a title which she could have set up in the first suit, as it is admitted that both her husband and her daughter were dead, and had been so for many years when she brought her first suit. If she omitted to put forward her strongest or any title then available to her and within her cognizance, "so much the worse for her," to use the words of Phear, J., in his decision in *Umatara Debia* v. *Krishna Kamini Dasi* (1), which decision was affirmed by the Privy Council.

As to the jote in Doorgapore, it seems clear that the plaintiff cannot, under the provisions of s. 7 of Act VIII of 1859, claim it in the present suit, having omitted to do so in her first suit.

I would reverse the decision of the Subordinate Judge and decree the special appeal.

JACKSON, J.—In my opinion the plaintiff is concluded by the previous decision, on the authority of the Privy Council judgment in *Woomatara Debia* v. *Unnopoorna Dassee* (1); but I should have been of the same opinion upon other grounds and independently of that authority.

This case is not precisely analogous to any of those which have been referred to, and in my opinion there is, strictly speaking, no new title set up by the plaintiff constituting a new cause of action. In the first suit she claimed the property in question as heir of her deceased husband. Defendant's case was that it was not property left by the deceased husband, but had been given by him in his lifetime to his daughter, the defendant's wife, who at the time of bringing the suit was dead, and that

(1) 2 B. L. R., A. C., 102; S. C. on appeal to P. C., 11 B. L. R., 158.

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defendant held it, and was entitled to it, as the heir of that daughter, his own wife.

Under the procedure before Act VIII of 1859, the plaintiff, in the filing of an answer to this effect, would have been entitled to put in an application, and doubtless would have done so, if she had chosen to contest the point, to the effect that, assuming such gift, then the plaintiff, and not the defendant, was heir to the donee, and so entitled. And therefore the Court, I conceive, would have been bound to try as well the issue of fact as to the deed of gift, as also the further question whether, if the gift was true and valid, the defendant or the plaintiff was heir.

Under the Code there is neither answer nor replication, but the parties may tender issues upon a further allegation, written or oral, and in my opinion it was incumbent on the plaintiff, if she had a claim as heir of her daughter, to ask for an adjudication of it upon the opposite claim being set up by the defendant.

The present suit, therefore, has for its purpose the raising of an issue which was triable in the former suit, but which the plaintiff then declined.

In the Madras case (1) decided by the Privy Council, the plaintiff, in a later suit for the same subject-matter, sought to rely upon a will which, by his counsel, he had formally and deliberately abandoned, and Lord Westbury, who as Lord Chancellor had decided *Hunter* v. *Stewart* (2), which case had been referred to in the Court below, said, in delivering judgment:—"It is impossible that any such suit should be allowed to proceed. In the first place it is clear upon the former record, that the appellant had then the power of relying on that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might first have insisted that it was an undivided property, and that therefore the plaintiff in those suits had no interest therein; and secondly, he might have pleaded, but if it shall turn out to be a divided property,

(1) *Srimut Rajah Mootloo, &c.*, v. *Katama Natchiar*, 11 Moore's I. A., 50.

(2) 31 L. J., Ch., 346.

then my title arises under this instrument, and I plead and rely on it as a valid decree in my favor." The alternative case for the plaintiff in this suit appears to me to present no greater difficulties than the suggested alternative plea for the defendant in the other. It is true that the argument was stronger against the plaintiff in that case than in the present, because their Lordships considered that there was a want of *bonâ fides* in the plaintiff, but that only contributed to the grounds of the decision, and was not the sole or the main ground. The judgment further lays it down that "when a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward." And it seems to me that the same principles would apply with equal force, and certainly with equal reason, to claimants in this country who are seeking to disturb possession. Their Lordships say further on, "the thing was in issue, and what was in issue must be taken to have been decided by the judgment." Here if the heirship to the daughter was not in issue, it was only not so because the plaintiff would not recite the issue.

In *Hunter* v. *Stewart* (1), Lord Westbury said that he could find no authority for the doctrine that in civil suits, a case, which was known to the plaintiff when he filed his first bill, could not be entertained as made by the second bill. But that is not the present case; what we have now before us is a question raised by the opponent in the first suit, and not gainsaid then, for which no doubt there is an excellent reason, *viz.*, that if the plaintiff had met it, he was pretty sure of an adverse decision at least in the lower Court. But a change in the view of the law upon any particular point taken by the highest tribunal in this country is of course no justification for bringing a suit which principle excludes.

I think it unnecessary to enter here upon a discussion of what is meant by "a cause of action which has been heard and determined, &c." But it may be observed that the term

(1) 31 L. J., Ch., 346.

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"cause of action," as cited in Indian courts, is much older than the Civil Procedure Code, for it occurs in many parts of the first regular enactment touching the Civil Courts in Bengal, Regulation III of 1793.

I may also remark that the issues which exhaust what is termed (s. 141) the real question, is controversy between the parties, *i. e.*, drawn not so much from the plaint, as from the allegations, written or oral, made by them respectively; and my impression, founded on much consideration of the several provisions of the Code, certainly is that the Legislature clearly intended the whole controversy between plaintiff and defendant upon the subject-matter, so far as their knowledge permitted, to be tried out and conclusively decided, subject only to appeal and review of judgment. As to the judgment of the Privy Council in *Woomatara Debia* v. *Unnopoorna Dassee*(1), if I were satisfied that the decision of their Lordships really rested upon narrower grounds, I should not be much influenced by the terms of general concurrence in the judgment of Phear, J. But I think justly, for the reasons stated by Markby, J., in his judgment, which I had had the advantage of reading, that their Lordships really adopt the whole of Phear, J.'s reasoning, and that their judgment could not otherwise have well been precisely what it was.

Finally, I would say that it is extremely difficult to discover real injustice or hardship in any of the supposed cases which are put, and, so far as that argument is entitled to any consideration, that the balance of public convenience is very much, in this country at least, in favor of a stringent rule.

I would dismiss the present suit.

MARKBY, J.—In this case one of the questions referred to us, and which we took time to consider, is, whether a plaintiff who has brought a suit to recover property upon the strength of one title can bring a second suit to recover the same property upon the strength of another title of which he might have availed himself at the time the former suit was brought, but which he did not set up in the plaint then filed.

(1) 11 B. L. R., 158.

I think this question is concluded by authority.

Phear, J., in the case of *Umatara Debia* v. *Krishna Kamini Dasi* (1), dealing with a second suit brought to recover possession of property which the plaintiff had failed to recover in a former suit, said "it appears to me that her cause of action was in both suits the same. In both she (the plaintiff) sought to recover from the defendants the same land, on the ground that it was wrongfully withheld from her by them, and the wrong-doing of the defendants was the same act or series of acts in the one case as in the other. It is true that the title to possession on which the plaintiff now relies is different from that which she set up in 1851. But I think the difference in the title put forward does not change the cause of action within the meaning of s. 2 of Act VIII of 1859. The plaintiff's cause of action, that which obliges her to seek the aid of the court of justice, is simply this, namely, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain lands which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title, or her real title, so much the worse for her. The adjudication of the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint by whatever title it might be capable of being then supported." This judgment was concurred in by Sir Charles Hobhouse, the other Judge before whom the appeal to this Court in that case was heard.

These broad and general principles had not, I believe, been laid down in this country before. On the other hand, I believe I am justified in saying that in every country in Europe which has adopted the civil law, the matter was settled the other way. The French law on the subject will be found in Pothier, Traité des Obligations, section 895, who gives the following example:—"If I being the heir-at-law of the deceased

(1) 2 B. L. R., A. C., 102.

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attacked his will as being not genuine or invalid, and on that ground I claim the inheritance, even should I fail, that will not prevent me from claiming the inheritance on other grounds." For the general modern views upon the subject I may refer to a work recently added to our library, Arndt's Pandekten, section 116, note 5, where the matter is very clearly and concisely treated. It there appears that the doubt which has been recently started, whether a particular passage in the digest, upon which the practice of modern Europe in this matter is in part founded, has been correctly understood, has had no effect whatsoever in shaking the rule of law hitherto observed, namely, that in a suit brought to recover possession founded upon title, only that title which is put forward is adjudicated upon.

All this was pointed out by Holloway, J., in the case of *Chinniya Medali* v. *Venkatachella Pillai* (1), where that learned Judge expresses an opinion upon the general question precisely the opposite to that taken by two Judges of this Court in the case I have referred to. Prior therefore to the Privy Council case, to which I shall hereafter advert, the law in this country was not settled.

In England, as is well-known, the title to property is tried in a way wholly different from that in which it is usually tried in the continental countries of Europe and in this country. Here, and in most other countries, the suit generally brought is a suit to recover possession founded upon title. In England the suit is either ejectment, which has a special and peculiar history of its own, or trespass; and there is no practical difficulty in trying separately as many titles as a man chooses to put forward.

This being the general state of the law which, upon a matter of this kind, the Privy Council no doubt fully considered, their Lordships have, as it appears to me, thought fit deliberately to adopt as the law of this country what I may call the stricter of the two views which have been expressed in the Courts here. The case of *Umatara Debia* v. *Krishna Kamini*

(1) 3 Mad. H. C. Rep., 320.

Dasi (1) above referred to, was carried by the plaintiff on appeal to the Privy Council, and a decision was given, which, in my opinion, has settled the law. Their Lordships, after referring to the terms of the second section of Act VIII of 1859, say, "the first question is what is meant by the 'cause of action.' And in the present case, they are clearly of opinion that the cause of action in both suits was the dispossession of the appellant." It is there shown how that dispossession took place, but the title of the plaintiff is not anywhere alluded to as forming any part of the cause of action. In the subsequent part of the judgment, their Lordships expressly say that "they entirely concur with the judgment delivered by Phear, J., in the High Court," and they dismissed the appeal (2).

The question has come before this Court once since this decision of the Privy Council was given, and in that case Sir Richard Couch, referring to this decision and to another decision of the Privy Council in *Srimut Rajah Moottoo Vijaya Raghanada* v. *Katama Natchiar* (3) (but which does not appear to me to be so applicable), says that the plaintiffs in the case before him "having the means in the former suit of proving the title by accretion to Rughoorampore, or by accretion to Lukhedea, or by accretion to both, they are barred by the judgment in that suit, and cannot bring another setting up a title by accretion to Lukhedea, and whether the Subordinate Judge put a proper construction upon the plaint or not is not material. If they did set up a title by accretion to Lukhedea, that has been decided against them. If they did not, they ought to have done it, and having omitted to do it, they cannot do it now"—*Kashee Kishore Roy Chowdhry* v. *Kristo Chunder Sandyal Chowdhry* (4). Sir Richard Couch goes on to refer to the judgment of Holloway, J. in *Chinniya Mudali* v. *Venketachellai Pillai* (5) as supporting this view. But (I say it with deference) there seems to have been some misapprehension in Sir Richard Couch's mind as to the effect of that judgment.

(1) 2 B. L. R., A. C., 102.
(2) 11 B. L. R., 158.
(3) 11 Moore's I. A., 50.
(4) 22 W. R., 464.
(5) 3 Mad. H. C. Rep., 320.

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It does not support the view taken by the late learned Chief Justice; it is precisely the other way. But of course having been delivered before the judgment of the Privy Council, it is of no weight. It has, however, induced me to consider very carefully indeed the decision of the Privy Council, and to see whether their Lordships do really adopt the broad and general rule laid down by the two learned Judges of this Court.

I, therefore, proceed to consider the reasons which have suggested themselves, or which have been suggested to me, why the decision of the Privy Council may be treated as not conclusive upon the question before us.

It is said in the first place that, in the case before the Privy Council, the titles put forward in the two suits were not different, and that it was a mere question of "quantity and boundary." Their Lordships, in one part of their judgment, speak of the claim to the land as *towfir*, as a claim by gradual squatting and encroachment. That is not generally the meaning of *towfir*, though the word may have been so usedin that case. It is, however, difficult now to say exactly how the plaintiff's case was there put. But this is clear that the Judges, who heard the appeal in this Court, had no doubt whatever that the titles were different in the two cases, and the Privy Council say (at p. 167) "with the full knowledge of all the circumstances, she chose to say 'I admit that I am in possession of all that I was entitled to under the doul, but I claim this land, the whole of it, as *towfir* land.' The contention now is that, although she thought fit to take that course then, she has now a right to fall back upon the other title, and it is with the case so put that their Lordships deal." At any rate, therefore, the Privy Council seemed willing to adopt for the purpose of argument the view taken by this Court that the titles were different.

Again, it is said that the cause of action in both the suits under the consideration of the Privy Council was actual dispossession, whereas, in the special appeal now before us, the plaintiff never has been in possession. Possibly that may be so, though it is not very clear. But I confess that I am unable to see any sound distinction upon this ground. The important

question is, whether in s. 2 of Act VIII of 1859 the words "cause of action" include the title upon which the plaintiff relies to recover possession in a suit. I can quite understand it being held that they did include this. But I cannot understand how they can be interpreted to include the title where the plaintiff is wrongfully put out of possession of land of which he has never had possession, and not to include it when the plaintiff is wrongfully kept out of possession of land of which he has been in possession. Phear, J. carefully words his judgment so as to exclude any such distinction. The Privy Council say nothing to the contrary, and in my opinion it is clear that the suit brought in this country to recover possession upon title, whether there has been dispossession or not, is what is known as a suit *in rem*, and not a suit in *personam* arising upon an obligation *ex delicto*, or what in England would be called an action of *tort*.

Further, the Privy Council do, no doubt, use these words:—"Nor does it appear to their Lordships necessary to decide, whether in some of the cases put by Mr. Doyne, where the party was suing entirely under a new and a different title, such a distinction as he contended for might not be taken; because here it seems to their Lordships that the matter in dispute throughout was the title of the talookdar of this talook to the land in question, and the possession which she had thereby acquired, and it is perfectly clear upon the proceedings in the earlier suit that her right in any way to this land was capable of being therein determined." The report of the argument in the case does not assist us in discovering what the class of cases is which is here referred to. But I think it is clear that by the words "new and independent title," the Privy Council meant some title which could not have been put forward in the former suit. This must mean a title newly acquired, because it is clear that under our procedure a person may put forward in one and the same suit as many different titles as he likes.

It is further said that the Privy Council did not intend to decide anything more in the case under consideration than was decided in the case reported in 11 Moore's Indian Appeals, page 50, from which a passage is quoted. Between the facts

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of the case reported in the 11th Moore and the facts of the case in the Privy Council now under consideration, there is a vast difference. In the earlier case—Kattama Natchiar's case as it is called,—the defendant had deliberately through his Counsel disclaimed all title under a certain document as a will, and insisted that it must be regarded by the Court as not testamentary. It would seem, therefore, that there had been in the earlier suit what was in fact equivalent to a judicial determination of the very claim put forward in the second suit. But Lord Westbury, in giving judgment, put the case upon more general grounds. He laid down this general proposition, that "where a plaintiff claims an estate, and the defendant being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him according to his knowledge, then to bring forward." That passage is quoted in the judgment I am now seeking to interpret. If we were to strike out the words "according to his knowledge," the principle there applied to a defendant would be identical with the principle it is now sought to apply to a plaintiff. Probably it was in consequence of these words that the Privy Council recognize that the two cases are not quite identical. Nothing is said in the more recent case about the knowledge of the plaintiff.

There are some passages in the judgment of the Privy Council which refer to admissions made by the plaintiff in the former suit inconsistent with her second case, and the Privy Council also say (p. 168), "the Court in that suit seems almost to have considered that the title now sued upon had been put forward and could not prevail." Of course, if there had been a previous adjudication of this very question, or an admission deliberately made and recorded equivalent to an adjudication, *cadit quæstio;* but the Privy Council do not say there had been either the one or the other, as they would assuredly have done had they intended to place their judgment upon either of these grounds. And if they had intended to confine their judgment to either of these grounds, they would not have expressed their entire concurrence in the judgment of this Court then under appeal.

I have considered the matter at this length, both because I

feel the importance of the question raised, and because we are not unanimous as to the effect of the Privy Council decision. I confess that I have not been without doubt upon the matter, but, upon the best consideration I can give to the words of their Lordships, and with great deference to those who think otherwise, the conclusion I have come to is that the Privy Council has already determined the question put to us in the negative, and that this Court has no other duty than to follow that decision.

Upon the other question referred to us our opinion was expressed during the argument.

MACPHERSON, J.—I also am of opinion that this suit is barred.

I think that the question of the defendants' being his wife's heir as regards this property was in fact before the Court (although there may have been no contest about it) in the first suit, and that the decision then given against the plaintiff necessarily contains a decision of the defendant's right, as heir of his deceased wife, to hold the property against the plaintiff. We unfortunately have not before us the actual pleadings and proceedings in the former suit. But there can be no doubt that in that suit the plaintiff took it for granted, and admitted, that the defendant was his wife's heir, so far as this property was concerned.

Further, I agree with Markby, J., in thinking that, even if the question was not in any way decided in the former suit, we now are bound to hold, in accordance with the recent decisions of the Privy Council, that it ought to have been raised in the former suit if at all, and that not having been raised then it cannot be raised in the present suit.

PRIVY COUNCIL.

P. C.*
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May 9, 16, 17 & 18.

KHAJOOROONISSA, WIDOW OF ENAYUT HOSSEIN, DECEASED (DEFENDANT) *v.* ROWSHAN JEHAN (PLAINTIFF).

[On appeal from the High Court of Judicature at Fort William in Bengal.]

Compromise—Appeal—Fraud—Mahomedan Law—Devolution of Property—Deed of Gift—Will—Presumption of Marriage.

IN a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the defendant, who thereupon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed. The defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his opportunity of appeal by his own fraudulent conduct. *Held*, by the Judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff was to be allowed to be heard against so much of the original judgment as was unfavorable to her, the defendant must similarly be heard against so much of the same judgment as was unfavorable to him.

The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property and to confer it on the donee. It is incumbent on those who set up transactions of this nature, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

* *Present:*—SIR JAMES W. COLVILE, SIR MONTAGUE E. SMITH, and SIR ROBERT P. COLLIER.

By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share, *held* to be an attempt to give, under color of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife.

THIS was an appeal from a decision of a Division Bench of the Calcutta High Court (1), Kemp and Seton-Karr, JJ., dated the 6th January, 1866, which affirmed a judgment of the Judge of Zilla Purneah, dated the 28th March, 1865, and modified another judgment of the same Judge passed in the same suit, dated the 6th April, 1865; and also, by special leave of Her Majesty in Council, from certain orders of a Full Bench of the High Court rejecting applications for review of judgment (2).

The suit in which the appeal arose was instituted in the Zilla Court of Purneah on the 5th May 1860, by the respondent Ranee Rowshan Jehan against Rajah Enayut Hossein and others, to obtain possession of certain shares in the zemindari of Soorjapore and other property belonging to the estate of her paternal grandfather Rajah Deedar Hossein, and to which she claimed to be entitled partly in right of her father Nuzeeroodeen Hossein, directly and as heir of his brother Edoo Hossein, and partly in right of her paternal grandmother Bebee Loodhun.

The facts of the case were the following:—On the 18th November 1839, Rajah Deedar Hossein, at that time the proprietor of an undivided moiety of the zemindari of Soorjapore, executed a deed of gift, in which it was set forth that, in consideration of a payment of Rs. 10,000, he gave to his eldest son, Enayut Hossein, one-third of his moiety of the said zemindari. On the same date he also executed a will, in which he referred to the said deed of gift, and in which, after appointing Enayut

(1) See 5 W. R., 4.

(2) See 1 B. L. R., F. B., 1.

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Hossein his executor, he gave the following directions for the disposal of that portion of his estate which was not included in the deed of gift:—

"I divide the remaining two-thirds now under my possession, uninterfered and unconcerned by any one else, into three portions. One portion to be laid out as the executor may think proper for my, the testator's, welfare hereafter, by charity, and pilgrimage, and keep up the family usage, namely, the expenses of the mosque, and tazeeadaree of the sacred martyrs, and for the comfort of the travellers, the surplus amount to be appropriated by himself, the executor. From the other two-thirds, after paying off all the debts of my creditors, giving allowances as per shares to the executor himself and my sons, daughters, and wives, the right-holders, and salary-holders, that is friends and servants, repairs of houses and court expenses, &c., including other necessaries as below detailed without diminution and increase, he shall keep every one by his good conduct, and affection, contented and satisfied. It is also necessary for all persons having rights, heirs, and friends connected with me, to obey the said executor, and consider him my representative. . . . .

None of the heirs have power to sell, or divide the landed property mentioned in the will."

The moveable property he directed to be divided into three portions, one to be retained by Enayut for general expenses, and the other two-thirds to be divided in accordance with the Mahomedan law.

The details referred to in the body of the will as to the allowances to be paid were contained in a schedule, but whilst in the body of the will provision was made for the *wives* of the testator, an allowance of Rs. 175 by the month was given in the schedule to *the wife* of the testator, and monthly allowances of Rs. 75 to each of four *female servants.*

At the time when these instruments were executed, it would appear that the zemindari of Soorjapore was under attachment, the collections being made by a surbarakar.

In May 1841, Enayut Hossein applied for mutation of names, in respect of the one-third share, which he claimed as his under his father's deed of gift. This application was resisted by Deedar Hossein, who, in a petition to the Collector, dated the

9th June 1841, alleged that he had received no consideration; and that he never had any intention of parting with any part of his estate during his lifetime, and the application was in consequence rejected.

On the 19th November, a petition was presented to the Collector, purporting to proceed from Rajah Deedar Hossein, in which he admitted the deed of gift and consented to the mutation of names. This petition was dated the 14th, and the Rajah died on the 15th November 1841. The Collector declined to act upon it.

Rajah Deedar Hossein was survived by five sons, five daughters, and five wives, or (as the appellant contends) one wife and four concubines. The family belonged to the Sheea or Imameea sect of Mahomedans. On Deedar's death, disputes arose among his heirs, which were carried both to the civil and criminal courts. On the 19th November, 1842, in proceedings taken by Enayut Hossein under Act XIX of 1841, an order was passed by the Judge of Purneah, that, on furnishing security, he should be put in possession of his father's estate. The Collector's order, sanctioning the substitution of Enayut's name for his father's as proprietor of the zemindari, was not obtained until the 24th April 1844.

Nuzeeroodeen, the respondent's father and the third son of Deedar Hossein, died in the year 1844, and in 1852 his widow Khoobunnissa, as guardian and protector of her infant daughter Rowshan Jehan (the present plaintiff), instituted a suit to set aside the deed of gift and the will, and to obtain possession on behalf of her daughter of a 14-anna share (the daughter's share) and on her own behalf of a two-anna share of Nuzeeroodeen's property. The defendant, Enayut Hossein, relied on the deed of gift and will above referred to, contending that all that Nuzeeroodeen was entitled to was the allowance payable to him under the will. He alleged that in the year 1843, an amicable settlement for carrying out the terms of the will had been agreed to by all the members of the family, whereupon the allowances provided by the will had been paid by him to Nuzeeroodeen and the other beneficiaries, written receipts being given by them in acknowledgment of such payments.

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Judgment in this suit was given by Mr. Loch, at that time Judge of Purneah, on the 12th September 1855. He found as a fact that the deed and will had both been duly executed by Deedar Hossein. As to the will he held that by the Mahomedan law it was invalid without the consent of the heirs, and that their consent was not proved. As to the deed he held it to be valid, and to have the effect of transferring to Enayut Hossein one-third of Deedar's estate. He gave Khoobunnissa, as guardian of her daughter, a decree for fourteen-sixteenths of Nuzeeroodeen's share of the remaining two-thirds.

Enayut Hossein appealed from that decision; and Khoobunnissa would have had a clear right to a cross-appeal but for what subsequently transpired.

On the 27th June 1855, while the above suit was pending, the defendant, Enayut Hossein, brought a cross-suit, in which he sought to have it declared that Khoobunnissa, on receipt of certain consideration, had agreed to compromise the suit brought by her on her daughter's behalf, and to recognize the validity of the will. This cross-suit was at first resisted by Khoobunnissa, but eventually on the 30th August 1856, petitions which purported to give the assent of Khoobunnissa and her daughter Rowshan Jehan, and in which the latter was represented as having then attained full age, were filed in Court, admitting the fact of the alleged compromise, and asking the Court to sanction it. An order was on the same day made by the Judge disposing of the case in accordance with the prayer of these petitions. Subsequently on the 10th December 1856, when Enayut Hossein's appeal in the suit brought by Khoobunnissa came on for hearing by the Sudder Court, instruments of mutual compromise, one on behalf of Enayut Hossein, the other purporting to be on behalf of Khoobunnissa and of her daughter, were presented to the Court, and an order was made that the case be decided according to the instruments.

On the 17th December 1859, Ranee Rowshan Jehan presented a petition to the Sudder Court, in which she set forth that the order of the 10th December 1856 had been fraudulently and collusively obtained, and was not binding on her as she

was not then of full age, and in which she asked to have the matter reopened by way of review. On the 6th March 1860, the Sudder Court declined to dispose of the matter upon review, and referred the petitioner to a regular suit.

Rowshan Jehan accordingly brought the present suit. She alleged in her plaint, that the deed of gift and the will set up by Enayut were not genuine nor valid, and that the suit brought by her mother on her behalf had been fraudulently compromised, she being then an infant. She prayed that the said compromise might be declared to be collusive and inoperative, that the alleged will and deed of gift might be set aside, that the order of the Judge of Purneah, dated the 19th November 1842, under which Enayut Hossein had obtained possession of all his father's property, might be reversed, and that possession might be awarded to her (the plaintiff) of the shares in Deedar Hossein's estate accruing to her in right of her father Nuzeeroodeen, of her father's brother Edoo Hossein, and of her father's mother Beebee Loodhun.

The defendant, Enayut Hossein, filed a written statement, in which he urged that the suit brought by the plaintiff's mother as her guardian had been settled and withdrawn, so as to bar the present suit. He also contended that the deed of gift and will which the plaintiff disputed were genuine and valid, and that under these Deedar Hossein's younger children, including Nuzeeroodeen and Edoo, were only entitled to allowances by way of maintenance and not to a share of the estate, and that they had assented to and accepted that provision. As to the claim in right of Beebee Loodhun, he contended that Beebee Loodhun was not a wife of Deedar Hossein with a right of inheritance, but only a *kadima*, or female slave. As to the claim in right of Edoo Hossein, he contended that Edoo had survived Nuzeeroodeen, in which case, the plaintiff was not entitled, under the Mahomedan law, to any share of his estate.

The case was twice remanded to the Zilla Judge by the High Court, on the second occasion with specific issues for his determination (1). The Zilla Judge decided the first ten issues

(1) See W. R., 1864, p. 83.

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which related to the validity of the deed of gift and of the compromise, and the decree founded thereon, in the plaintiff's favor; but with regard to the other issues which related to the share to which the plaintiff was entitled in the estate of Deedar Hossein in right of her father Nuzeeroodeen, her uncle Edoo Hossein, and her grandmother Beebee Loodhun, he held that it was not proved that Beebee Loodhun was a wife of Deedar Hossein with a right of inheritance, or that Nuzeeroodeen had survived his brother Edoo Hossein. He consequently rejected the plaintiff's claim in respect of their shares.

From the decision of the Zilla Judge, both parties appealed. On appeal, the High Court upheld so much of the Judge's decision as declared the compromise not to be binding, but reversed his decision in respect of the shares of Edoo and Beebee Loodhun, to both of which they held the plaintiff to be entitled. The High Court next proceeded to consider the plaintiff's claim to be heard against the validity of the deed of gift. With reference to this part of the case, it appeared that the only appeal which had been brought against Mr. Loch's decision of the 12th September 1855, in which it was held that the deed of gift was valid, but the will invalid, was that filed by Enayut Hossein, which was afterwards withdrawn in accordance with the terms of the alleged compromise. The defendant consequently urged that it was too late for the plaintiff to ask for leave to appeal in a case which had been decided ten years before; and at any rate, that, on the compromise being set aside, his own appeal against Mr. Loch's decision should be allowed to revive. On this point the Court decided against the defendant and refused to allow him to revive his appeal; but allowed the plaintiff to appeal from that decision, on the ground that it was only by the defendant's fraudulent conduct that she had been prevented from appealing before.

The High Court pronounced against the validity of the gift, and decreed the plaintiff's appeal, dismissing that of the defendant.

Applications for a review of judgment having been refused by the High Court, leave was obtained by the present appellant,

Ranee Khajooroonnissa on the death of her husband Enayut Hossein, to bring the present appeal to Her Majesty in Council.

Mr. *T. H. Cowie*, Q.C., and Mr. *J. D. Bell* for the appellant.

Mr. *Leith*, Q.C., and Mr. *Doyne* for the respondent.

Mr. *Cowie*.—On setting aside the compromise, the High Court was bound to hear the defendant's appeal against that part of the decision of the Zilla Court, dated the 12th September 1855, which declared the will to be invalid.

SIR J. COLVILE.—We had better first hear what the respondent has to say on that point. If the High Court was right in refusing to hear the defendant, it may not be necessary to go into the question of the validity of the will.

Mr. *Leith*.—The defendant was bound to prosecute his appeal within a certain time. Instead of doing so he chose to file a fraudulent compromise. He deprived himself by his own fraud of his opportunity of appeal.

SIR J. COLVILE.—Limitation applies only to the time within which an appeal is to be presented. If presented in time, is there any rule which requires it to be prosecuted within a fixed time?

SIR R. COLLIER.—Is special leave required to revive the appeal?

SIR M. SMITH.—If the defendant had a right to appeal, you cannot punish him for his fraud by depriving him of his appeal. Moreover, the plaintiff, not having herself appealed, her right of cross-appeal depended on the defendant's appeal.

SIR J. COLVILE.—The compromise having been set aside for fraud, we think the parties were remitted to their original rights.

Mr. *Cowie*.—There remain four points to be argued: 1*st*, the validity of the deed of gift; 2*nd*, the validity of the

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will; 3rd, the status of Loodhun; 4th, the survival of Eddoo. An objection was taken by the High Court, that the gift, being of a third part of the estate of the donor, was invalid under the Mahomedan law as to *musha* or confusion which denies effect to a gift of an undivided portion of a divisible thing. But where the thing given can be made certain, the law as to *musha* does not apply. See Baillie's Digest of Mahomedan Law, Hanifeea, Book VIII, Chap. I, pp. 515, 516, of the 2nd edition: see also, *ibid*, Chap. II, p. 520, where it is said that "what is required is that the thing be separated at the time of taking possession, not at the time of the gift." Here the donee could at once go to the Collector, and obtain registration of his separate interest in his individual name. There was nothing further to be done by the donor to make the gift effectual. The doctrine of *musha* was discussed in *Ameeroonnissa Khatoon* v. *Abadoonnissa Khatoon* (1). The parties in that case were of the Suni sect, but the parties in the present case are governed by the Sheea doctrines of the Mahomedan law which are not identical with the Suni doctrines on the subject of *musha*. According to the Sheea view, the gift of a share in joint and undivided property is lawful. See Baillie's Digest of Mahomedan Law, Imameea, p. 204, and note 8.

Moreover, the deed is expressed to be for a consideration. It was in the form known to the Mahomedan law as hibba-bil-awaz, and resembled a sale in all its properties: Macnaghten's Principles of Mahomedan Law, Chap. V, para. 15; Baillie's Digest of Mahomedan Law, Hanifeea, p. 123. In such transactions seizin of the donee is not essential to complete the transfer. [SIR J. COLVILE.—There must be an executed consideration.] What we submit is, that where there is no consideration, the gift is good if seizin follows; but that where there is consideration, the gift is good without seizin. We meet both alternatives. There is evidence of consideration having been given, and there is evidence of seizin. As the property was under attachment, actual possession could not be had. But the defendant applied for, and eventually obtained a mutation

(1) 15 B. L R., 67; S. C., L. R., 2 I. A., 87.

of names, which was the only way in which seizin could, under the circumstances, be taken.

Next as to the will. The Zilla Judge had held the will to be invalid because it required, and had not received, the consent of the other heirs. We say, first, that consent was given, and, second, that no consent was necessary. There was evidence that Nuzeeroodeen had consented, and the plaintiff was bound by her father's consent. But the Judge was mistaken in holding that the effect of the will was to give a bequest to one of the heirs, namely, to the defendant, which would require the consent of the rest. The testator leaves a third of his property to pious uses. That was within his power, and the will is valid for that third: see Baillie's Digest of Mahomedan Law, Hanifeea, Book X, Chap. I, pp. 624, 625, of 2nd edition. [SIR J. COLVILE.—The testator might give to his son as executor for pious uses. Mr. *Leith.*—We do not dispute a testator's power to make a *bonâ fide* gift to pious uses.] The restriction against a bequest to an heir is a doctrine of the Suni law. Under the Sheea law, there does not seem to be any such rule: Baillie's Digest, Imameea, p. 244.

The plaintiff's claim in right of her grandmother, Beebee Loodhun, must fail, if Beebee Loodhun was not herself entitled to any share of Deedar Hossein's estate. She is not shown to have stood in any different position from that of the other three female servants mentioned in the schedule to the will, to whom a monthly allowance of Rs. 75 is to be given. If a wife at all, she appears, as held by the lower Court, to have been only a *temporary* wife, who, under the Sheea law, would not inherit: Baillie's Digest, Imameea, pp. 44, 344. Moreover, Loodhun by accepting the allowance given her by the will, indicated her consent.

The plaintiff's claim in right of her uncle Edoo depends on whether her father, or Edoo, died first. The evidence seemed to show that Edoo died after Nuzeeroodeen, and in that event it is admitted that the claim fails.

Mr. *Leith*, Q.C., and Mr. *Doyne* for the respondent.—An ordinary deed of gift requires seizin, that is, possession to

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give it validity, but in the present case the instrument is said to be a hibba-bil-awaz, a deed of gift for consideration, which, by the Mahomedan law, is of the nature of an exchange or sale, and if *bonâ fide* requires no seizin to perfect the transfer. To make a transaction of this nature binding there must be consideration actually given, and there must be an intention on the part of the donor to divest himself, and pass the property to the donee. But here there is no good evidence of the consideration expressed in the instrument having been received. The passing of the consideration is not a mere formality. [SIR R. COLLIER.—It might be a formality and yet essential under the Mahomedan law, that it should take place at the time.] It was clear from the evidence that there was no intention on the part of Deedar Hossein to divest himself and pass the property during his lifetime. He opposed Enayut's attempts to obtain mutation of names, and possession by mutation of names was not in fact obtained till some years after his death. A gift which is not to have effect until the death of the donor is a legacy which one heir cannot take without the consent of the rest: Macnaghten's Principles of Mahomedan Law, Chap. V, "On Gifts," sec. 11. Moreover, at the date of the deed the property was under attachment, and not in the actual possession of Deedar Hossein. A gift of a thing, not in the possession of the donor, is void: *Ibid*, sec. 3, and see Precedents of Mahomedan Law, Case VI, at p. 201. This was a mutual gift which requires mutual seizin: see Hedaya Book XXX, Chap. II, Hamilton's Transl., Vol. III, p. 303, where it is said:—"If a person give something to another, on condition of that other giving something to him in exchange for it, the mutual seizin of the respective returns is regarded; that is to say, the contract is nothing till the two seizins take place."

As to the will. It is argued that, although the will bears on its face a bequest to Enayut of one-third of the property not dealt with by the deed, the real intention is to create a trust for pious uses. But Enayut has a discretion to give what he pleases to these uses, and he has a beneficial interest in what remains over after these uses are satisfied. Moreover, with regard to the remaining two-thirds of the testator's property, the will creates a perpetual trust for the benefit of

persons other than the heirs, and gives Enayut a power to control the shares of the heirs. This by Mahomedan law is invalid without the consent of the other heirs. [Mr. *Cowie*.—I only argued that the will was good for one-third.]

As to the status of Beebee Loodhun. It was for the appellant, who alleges that Beebee Loodhun was only a temporary wife, to establish that peculiar and exceptional kind of marriage. As to temporary marriages, see Baillie's Digest, Imameea, Introduction, p. xiv, and see pp. 12, 29, 39, 41, 42. It appears from the passages cited, that, if no mention is made of time, the contract is permanent. [SIR J. COLVILE.—If a term is limited and the connection continue beyond that term, what is the status of the woman? SIR M. SMITH.—It would seem from what is said at p. 44 of Baillie's Digest, Imameea, that her position after the time limited would be that of a concubine.] The point that the marriage was temporary was not taken by the defendant. His allegation was that Beebee Loodhun was a female servant or slave. [SIR J. COLVILE.—What proof did *you* give of her *status?*] She lived for eighteen years in Deedar's house, and was the acknowledged mother of a son, whom Deedar recognized to be his lawful son. A presumption is raised from these circumstances in favor of marriage requiring to be rebutted. Macnaghten's Principles of Mahomedan Law, Chap. VII, Sec. 32, and see *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1). [SIR J. COLVILE referred to *Mussamut Jariut-ool-butool* v. *Mussamut Hoseinee Begum* (2); SIR M. SMITH referred to *Newab Mulka Jehan Saheba* v. *Mahomed Ushkurree Khan* (3), decided by their Lordships on the 20th March 1873.]

Mr. *Cowie* replied.

At the conclusion of the argument, their Lordships' judgment was delivered by

SIR R. P. COLLIER (who after stating the facts continued):—The case came on appeal before the High Court, who gave

(1) 3 Moore's I. A., 295. (2) 11 Moore's I. A., 194.
(3) 8 Mad. Jur., 306.

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a very elaborate judgment in January 1876. The High Court agree with the learned Judge of the Zillah Court in his finding on all the ten issues relating to the compromise, and there being two concurrent findings upon these issues, which are questions of fact, their Lordships are by no means disposed to disturb them. Indeed, it has scarcely been argued that, giving effect to the rule on this subject, they should be disturbed.

The High Court next came to the conclusion that the compromise being set aside, owing to fraud and collusion on the part of Enayut Hossein, Enayut Hossein's right of appeal against Mr. Loch's judgment was not revived, whereas the right of appeal on the part of the plaintiff Rowshan Jehan was revived. From that finding their Lordships differ. It appears to them that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff is to be allowed to be heard to appeal against so much of the decision of Mr. Loch as is against her, Enayut Hossein ought to be heard to appeal against so much of the decision as is against him.

The High Court further affirm the decision of Mr. Loch on the subject of the will, which was in favor of the plaintiff, but they reverse his decision so far as it concerns the deed, which was against her. Further, they reverse the decision of Mr. Muspratt upon the two questions of the right of the plaintiff to succeed to Edoo Hossein, and of her right to succeed to her grandmother. The case, therefore, reduces itself to four questions,—first, the validity of the deed; secondly, the validity of the will; thirdly, the survivorship between Edoo and Nuzeeroodeen; and fourthly, the plaintiff's right to succeed to her grandmother.

The policy of the Mahomedan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property, to one of his sons, provided he complies with certain forms. It is incumbent,

however, upon those who seek to set up a proceeding of this sort, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been complied with. There is no question of the execution by Rajah Deedar Hossein of this deed giving one-third to his son Enayut on the 10th November 1839. The deed was either—to use English expressions—a deed of gift simply, or a deed of gift for a consideration. If it was simply a deed of gift without consideration, it was invalid unless accompanied by a delivery of the thing given, as far as that thing is capable of delivery, or, in other words, by what is termed in the books a seizin on the part of the donee. In their Lordships' judgment there was no delivery of this kind. Even assuming that although the estate was under attachment, a sufficient seizin in it remained to the donor which he could impart to the donee, still it appears by the evidence of Mr. Perry, which is treated as trustworthy on both sides, that in point of fact Rajah Deedar Hossein remained in receipt of the rents and profits of the property until his death. Therefore, if the deed were a mere deed of gift there was not that delivery of possession which was necessary to give it effect by Mahomedan law. A question which was touched upon, though not much argued, *viz.*, whether the doctrine of Mahomedan law relating to "confusion of gifts" applied, appears not to arise, as there was no delivery of possession.

But it was contended that this was a deed of gift for a consideration, and therefore that the delivery of possession was unnecessary. But it was conceded that in order to make the deed valid in this view of the case, two conditions at all events must concur, *viz.*, an actual payment of the consideration on the part of the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property, and to confer it upon the donee. Undoubtedly, the adequacy of the consideration is not the question. A consideration may be perfectly valid which is wholly inadequate in amount when compared with the thing given. Some of the cases have gone so far as to say that even a gift of a ring may be a sufficient consideration; but whatever its amount it must be actually and *bonâ fide* paid.

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(His Lordship then considered the evidence bearing on the payment of the consideration, and continued):—Taking into consideration all these circumstances, their Lordships have come to the conclusion, that the transaction set up on behalf of the defendants was not a real one, that no real consideration passed, that there was no intention on the part of the Rajah to part with the property at once to his son, but that both father and son were endeavouring to evade the Mahomedan law, by representing that to be a present transfer of property which was intended only to operate after the father's death. Their Lordships, therefore, agree with the High Court in their view of the effect of the deed.

The next question arises as to the will. It was found as a fact by Mr. Loch that the heirs had not consented to this will; and with that finding their Lordships are satisfied. But it was argued by Mr. Cowie, first, that the will did not require confirmation; secondly, that at all events so much of it as gave one-third to Enayut Hossein for pious uses was not in contravention of Mahomedan law, and was therefore valid without confirmation. The effect of the will is, in the first place, to declare Enayut Hossein the executor and representative of Deedar, and to direct him to look after the zemindari, and so forth. Then follows this passage: (His Lordship read the portion set out (1), and proceeded):—This will, in its general scope, appears to their Lordships to be in contravention of Mahomedan law. With respect to the limited contention, that it may be supported with respect to the devise of the one-third share, it appears further to their Lordships that that devise, considering the vague character of it, and that the beneficial interest is left to Enayut Hossein after he has devoted what he may deem sufficient to certain indefinite pious uses, is in reality an attempt to give, under colour of a religious bequest, an interest in one-third to Enayut Hossein, in contravention of Mahomedan law.

(After finding that there was no ground for reversing the decision of the High Court on the question of the survivorship

(1) *Ante*, p. 196.

between Edoo Hossein and Nuzeroodeen, His Lordship continued):—There remains the question of the right of the plaintiff to succeed to Beebee Loodhun, and that depends upon whether Beebee Loodhun was merely a concubine or a wife. It is an undisputed fact that Nuzeeroodeen, the son of Beebee Loodhun, was treated by his father and by all the members of the family as a legitimate son. It is not that he was on any particular occasions recognized by his father, but that he always appears to have been treated on the same footing as the other legitimate sons. This of itself appears to their Lordships to raise some presumption that his mother was his father's wife. That such a presumption arises under such circumstances appears to have been laid down in a case which has been referred to *Khajah Hidayut Oollah* v. *Rai Jan Khanum* (1), in which Dr. Lushington, who delivered the judgment of this Board, makes this observation:—" The effect of that appears to be, that where a child has been born to a father, of a mother where there has been not a mere casual concubinage, but a more permanent connection, and where there is no insurmountable obstacle to such a marriage, then, according to the Mahomedan law, the presumption is in favor of such marriage having taken place." In this case there is no evidence that Beebee Loodhun was a woman of bad character, or that her connection was merely casual. She appears to have lived in the house at all events up to the death of the Rajah.

The same doctrine was laid down rather more strongly in a recent case, which came before this Board on the 20th March 1873. In the case of *Newab Mulka Jehan Saheba* v. *Mahomed Ushkurree Khan* (2), a case from Oudh, and a Sheea case, their Lordships say :—" This treatment of the daughter by the appellants "—that is to say, the treatment of the daughter as a member of the family,—" affords a strong presumption in favor of the right of her mother to inherit from her." The question there was whether the mother, who was said to be a slave girl, inherited from her daughter, whom she survived, the same question which would have arisen in this case if Beebee

(1) 3 Moore's I. A., 295, at p. 318. (2) 8 Mad. Jur., 306.

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Loodhun had survived her son Nuzeeroodeen. Their Lordships go on to say, after noticing various acts of acknowledgment of the legitimacy of the child:—"After these acknowledgments, Mulka Jehan and the appellants who act with her ought in their Lordships' view to have been prepared with strong and conclusive evidence to rebut the presumption raised by their own acts and conduct; and in the absence of such evidence, they think the presumption must prevail."

It appears to their Lordships, therefore, that the undoubted acknowledgment by the father and by the whole family of the legitimacy of Nuzeeroodeen raises some presumption of the marriage of his mother. But it is said that that presumption is rebutted. The evidence chiefly relied upon for that purpose is the will of the Rajah, in which undoubtedly there is this expression:—"For the maintenance of four female servants monthly, 75; annually 900," and Beebee Loodhun does appear to have been one of those female servants there mentioned. At the same time, it is to be observed, this expression occurs only in the schedule; whereas in a part of the will preceding that schedule there is this expression:—"The shares of the executor and of the sons, daughters, and wives of the testator and other claimants from the estate fixed annually at" so and so; and the subsequent provision for the maintenance of every female servant appears to be an expansion of that paragraph in which they are spoken of as wives.

But further, there is the undoubted acknowledgment by Enayut Hossein himself of Beebee Loodhun being a wife, inasmuch as when Khyroonnissa, the principal wife, brings a suit against him, Enayut Hossein objects on the ground that Beebee Loodhun, one of the other wives, is not joined.

Under these circumstances it appears to their Lordships that there is evidence, not only from the acknowledgment of Nuzeeroodeen's legitimacy by the family, but from the admission of Enayut Hossein, that Beebee Loodhun was a wife, and not merely a servant. It is indeed alleged that she was what is called a temporary wife, and among the Sheea sect there appears to be a power of taking a mere temporary wife. But it is to be observed that there is no evidence of hers being what is called

a temporary marriage, and indeed the witnesses who seek to impugn the marriage on the part of the defendant speak of Beebee Loodhun not as a temporary wife but as a mere servant. The question, therefore, seems to be not whether she was a temporary wife in the sense attached to that term in Mahomedan treatises, but whether she was a wife or whether she was a mere servant. On the whole their Lordships concur with the finding of the High Court. The evidence preponderates that she was a wife and not as a mere servant, though no doubt a wife of an inferior order.

A question further arose as to the amount of the share which the plaintiff would be entitled to, assuming that Beebee Loodhun was a wife, and it would certainly seem that her share would only be a fifth of an eighth, that is a fortieth share; whereas she appears to have received something more by the decree of the Court. But it is to be observed that this in a great measure is a matter of detail and possibly a clerical error or miscalculation, which might have been set right on an application to the High Court, and that in fact the High Court did invite applications for the purpose of remedying errors of this kind.

The result is, that with the exception of the slight variation of amount in the case of the claim of Mussamut Beebee Loodhun, their Lordships will humbly advise Her Majesty to affirm the decree of the High Court and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *J. H.* and *H. R. Henderson.*

Agent for the respondent: Mr. *T. L. Wilson.*

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ORIGINAL CIVIL.

Before Sir R. Garth, Kt., C.J., and Mr. Justice Macpherson.

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MACKINTOSH *v.* HUNT.

Contract Act (IX of 1872), s. 74—Promissory Note—Stipulation to pay interest at high rate on default in payment of Note—Penalty.

The defendant and one *D*, on the 6th April, 1875, gave to the plaintiff, a money-lender, a promissory note, by which they jointly and severally promised to pay the plaintiff on the 6th September Rs. 400 "for value received in cash in hand paid, on signing and delivering this bond: should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent. *per mensem*." At the date of the note, the defendant and *D* were in the plaintiff's debt in respect of other promissory notes, and a sum of Rs. 100 was deducted from the amount of the note of the 6th April, in respect of one of these which was given up and in respect of interest on three others. A further sum of Rs. 125 was deducted as interest in advance for the five months previous to the due date of the note, and the balance Rs. 175 was paid by cheque to *D*. *D* died before the note became due. In a suit brought to recover Rs. 400 principal, and Rs. 400 interest, on the promissory note, on default being made in payment—*Held*, this was not a case in which a certain sum was agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act did not apply. The stipulation to pay interest at the "defaulting rate" was not in the nature of a penalty. *Held*, also, that looking at the nature of the transaction, the note contained a false statement of the consideration, which amounted only to Rs. 275; and there being nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant, and the consideration inadequate, the transaction was not one which ought to be enforced by a Court of Equity.

REFERENCE to the High Court, by the first Judge of the Calcutta Court of Small Causes, under s. 7 of Act XXVI of 1864.

The following was the order of reference:—

"The plaintiff, who is a well-known money-lender and frequent suitor in this Court, sued the defendant to recover Rs. 400 as principal, and Rs. 400 as interest, alleged to be due on a

promissory note, made by the defendant and one Norman Dutt, of which the following is a copy:

Stamp Paper—Rs. 2.

Calcutta, 6th April, 1875.

Rs. 400.

On the 6th September, 1875, we, jointly and severally as principals, promise to pay to Mr. H. Mackintosh, or order, the sum of Rs. four hundred, for value received in cash in hand, paid on signing and delivering this bond: should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 *per cent. per mensem.*

(Sd.) NORMAN DUTT.
" B. HUNT.

"The making of the promissory note was admitted by the defendant; and the plaintiff, on his side, admitted that, at the time of the making of the note, he had deducted in advance Rs. 125, being interest at the rate of 6¼ *per cent. per mensem* for the five months previous to the due date of the note, *viz.*, the 6th September, 1875. Norman Dutt, the other maker of the note, died at the latter end of April, 1875.

"It appeared in evidence that the defendant had never taken the trouble to read the note when he signed it, and that the amount of the note was paid to Norman Dutt, the other maker of the note, on the 7th April, 1875, according to a memorandum signed by him (Norman Dutt) somewhat as follows:—

	Rs.	A.	P.
Discount off (that is to say, the interest paid in advance)	125	0	0
Money payable on one old promissory note, delivered up	76	9	6
Money payable as interest on three other promissory notes	23	6	6
Balance paid by a cheque on the Bank of Bengal	175	0	0
Rs. ...	400	0	0

"It is also in evidence, that Norman Dutt owed the plaintiff money on other promissory notes.

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"The defendant pleaded fraud, not fraud in the sense of undue influence or over-reaching, but fraud in so far as the plaintiff had not paid the full amount of Rs. 400 as promised by him. I was satisfied, however, from the evidence that the plaintiff had, by special arrangement with Norman Dutt, paid the Rs. 400 as above-mentioned, and accordingly overruled the plea of fraud.

"The defendant also pleaded, and it was strongly urged on his behalf, that the defaulting rate of interest payable, *viz.*, 10 *per cent. per mensem*, or 120 *per cent. per annum*, must be considered as a penalty, and that it is consequently one of those cases in which a Court of Justice will give equitable relief.

"In the first place it has been contended, that s. 74 of Act IX of 1872 (Contract Act) is applicable to this case, and that consequently I need only give to the plaintiff reasonable compensation, not exceeding the rate of interest named; but I am of opinion, that s. 74 of that Act only applies to cases where an actual sum is fixed between the parties to be paid as compensation in the event of a breach of the contract; in other words, where the sum so fixed would otherwise be called liquidated damages, and also no doubt to cases where an actual penal sum has been fixed. But, even if the section is applicable, it would still be necessary to decide whether I ought to give the plaintiff the full amount named by the parties themselves, or give him reasonable compensation only, and whether, in so giving him compensation, I ought to take as my guide previous decisions on somewhat similar points. I am inclined to agree with Mr. Macrae, where he says, at page 80 of his Work on the Contract Act, 1872.—'But as the terms of this section leave it open to the Court in all cases to award less than the amount named, the rules on which the English Courts have proceeded in observing the distinction should serve as guides to the Courts here in exercising the discretion conferred upon them by this section;" so that whether the section is applicable or not, I think I ought to be guided by the old law in coming to a conclusion as to the amount to be allowed to the plaintiff on the promissory note.

"In this case the 10 *per cent. per mensem* interest becomes payable if the principal sum of Rs. 400 remains unpaid on the

6th September, and it is payable from that date, and not from the date of the bond, and herein the circumstances of this case differ materially from those of the case of *Bichook Nath Panday* v. *Ram Lochun Sing* (1), where it has been held that the increased rate of interest payable on default of payment of a lower rate from the date of the bond was in the nature of a penalty, and that the plaintiff was only entitled to recover interest at a reasonable rate. Here the high or higher rate of interest becomes payable on the happening of one event only, *viz.*, the failure to pay the Rs. 400 on the 6th September. It is not a promise to pay a very large sum immediately on failure of the payment of a much smaller sum. If the defendant, on the 6th of October, had paid up in full, he would only have paid Rs. 400 *plus* Rs. 48 as interest. I am of opinion, therefore, that the contract to pay the high rate of interest is not in the nature of a penalty, and I am fortified in this opinion by the decision of Lord Romilly in *Herbert* v. *Salisbury and Yeovil Railway Company* (2). There the contract was to pay certain purchase-money with 4 *per cent.* interest on or before the 1st July, 1858, in default of payment of the purchase-money on that date 5 *per cent.*, and again in default of payment of the purchase-money on or before the 1st January 1859, 8 *per cent.* on all moneys remaining unpaid. And His Lordship says:—'Here the parties thought fit to enter into the contract that the rate of interest was to be 4 *per cent.* up to a certain date, 5 *per cent.* for the next half year, and 8 *per cent.* for every subsequent year. I know of nothing to prevent persons entering into a contract of that description. A decision of Holloway, J., *viz.*, *Adanky Rama Chandra Row* v. *Indukuri Appalaraju Garu* (3), in which the whole matter was considered at great length, supports my views, and also to some extent the case of *Omda Khanum* v. *Brojendro Coomar Roy Chowdhry* (4), while I find that there are two contrary decisions of the Bombay High Court—*Motoji Ratnaji* v. *Sheikh Husen* (5) and *Pava Nagaji* v. *Govind Ramji* (6). Those two latter

(1) 11 B. L. R., 135.
(2) L. R., 2 Eq., 221.
(3) 2 Mad. H. C. Rep., 451.
(4) 12 B. L. R., 451.
(5) 6 Bom. H. C. Rep., A. C., 8.
(6) 10 Bom. H. C. Rep., 382.

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decisions are on all fours with the present case, but the former one seems not to have been considered at all, and in the latter the learned Judges, acting upon the rule *stare decisis*, refused to consider the question, whether or no the former one was rightly decided.'

"For the above reasons, I am of opinion that I must follow Act XXVIII of 1855, s. 2, and adjudge to the plaintiff the amount of interest agreed upon between the parties.

"But as the question is one of considerable importance, and one which frequently arises in this Court, I think I ought to refer it to the High Court. I, therefore, refer the following questions: 1*st*, whether or no s. 74 of Act IX of 1872 is applicable to this case; 2*nd*, if such section is not applicable, whether or no the defaulting rate of interest, mentioned in the promissory note, is to be considered in the nature of a penalty, and that it is consequently a case in which the Court ought to decree interest at a reasonable rate only; 3*rd*, if such section is applicable, whether or not the Court ought to allow the full amount of interest agreed upon, or allow only a reasonable rate of interest.

"Contingent on the opinion of the High Court, my judgment will be for the plaintiff for Rs. 800."

The parties were not represented by Counsel in the High Court.

The opinion of the High Court was as follows:—

GARTH, C.J.—We are of opinion that the contract to pay interest at 10 *per cent. per mensem*, if the principal sum of Rs. 400 were not paid on September 6th, the due date of the promissory note, is not in the nature of a penalty. It is true that this rate of interest is in the note called a "defaulting rate;" but, notwithstanding this expression being used, the contract is in fact merely that if the sum of Rs. 400 be not paid on a certain day, it shall from that day bear interest at 10 *per cent. per mensem*, or, in other words, at 120 per cent. per annum. In such a provision there is nothing in the nature of a penalty more than there is in a provision, that the promissory

note shall bear interest from the day of its date. The case seems to us to differ wholly from that class of cases in which a certain sum is agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act (IX of 1872) does not apply.

But, taking the facts as found by the Judge, the effect of the transaction between the parties is not what the learned Judge supposes it to have been. He is not correct when he says that the plaintiff took interest at the rate of 6¼ *per cent. per mensem* only for the five months up to September 6th. What happened (as found by the Judge himself) was this: on the making of the promissory note the plaintiff, the money-lender, paid or gave value to one of the makers to the extent of Rs. 275; and adding to that sum Rs. 125 as discount or interest on Rs. 275 for the five months up to the 6th of September, the note, dated the 6th of April, was given for Rs. 400 payable on September 6th.

It may be true that Rs. 125 as interest for five months on Rs. 400 is interest at the rate of 6¼ *per cent. per mensem*; but the sum actually advanced, or for which value was given, was not Rs. 400, but only Rs. 275. And Rs. 125 as interest for five months on Rs. 275 is interest at the rate of nearly 10 *per cent. per mensem*, and is considerably more than 100 *per cent. per annum.*

The plaintiff having thus paid or given value for Rs. 275 only, took a promissory note, payable at the end of five months for that sum, *plus* Rs. 125 as interest, *i.e.*, for Rs. 400; which last-mentioned sum was from the due date of the note to bear interest at 120 *per cent. per annum.* And this being the true nature of the transaction, the promissory note contains a false statement of the consideration, for in it the maker's promise to pay "Rs. 400 for value received in cash in hand paid on signing and delivering this bond."

Considering that the promissory note does not state truly the transaction between the parties; that beyond the fact that he signed the note, there is nothing to show that the defendant understood the real nature of the transaction; that the rate of interest is exorbitant, and the considerations grossly inadequate,

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we think the transaction is not one which ought to be enforced by a Court of Equity. The Calcutta Court of Small Causes is empowered to entertain equitable defences, and ought, as it appears to us, on the facts found, to have given the defendant relief.

The judgment for Rs. 800 is set aside, and judgment will be entered for the plaintiff for Rs. 400 with interest at 12 *per cent. per annum* from September 6th, 1875, to the date of suit, without costs.

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Birch.

1876 *June* 28.

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH (A MINOR).

BAIJNATH SHAHAI AND OTHERS *v.* DESPUTTY SINGH.*

Creditors of alleged Heir—Application for grant of probate—Succession Act (Act X of 1865), s. 250.

A Hindu testator died, leaving *B*, alleged to be his adopted son, and *C*, who would be his heir in default of adoption. On application made by *B* for probate of the will after the usual notices, the creditor's of *C* came in and opposed the grant of probate.

Held, under the Succession Act, as made applicable by the Hindu Wills Act, that the creditors were not parties having any interest in the estate of the deceased, and therefore were not entitled to oppose the grant of probate.

THE facts of the case appear sufficiently in the judgment.

Mr. *Kennedy* and *Munshi Mohamed Yoosoof* for the appellants.

The *Advocate-General*, offg. (Mr. *Paul*) and Mr. *Woodroffe* for the respondent.

The following cases and authorities were referred to by Counsel on both sides:—

Dabbs v. *Chisman* (1), *Baskcomb* v. *Harrison* (2), *Kipping* v. *Ash* (3), and Coote's Probate Practice, pp. 227, 228, and 231, and cases there cited.

* Miscellaneous Regular Appeal, No. 259 of 1876, against the order of A. V. Palmer, the Officiating Judge of Zilla Shahabad, dated the 9th of August, 1875.

(1) 1 Phill., 156. (2) 2 Rob. Ecc., 118. (3) 1 Rob., 270.

The judgment of the Court was delivered by

KEMP, J.—On the 14th of July 1875, Baboo Desputty Singh, a minor, through the manager of his estates, Abdool Hye, applied to the District Judge for probate of the will of the late Bindessurree Pershad Singh, who it is alleged died at Arrah on the 31st of July 1871 leaving properties, moveable and immoveable, situated in the district of Shahabad. To the petition, an instrument purporting to be the will of the deceased was annexed. Mr. J. H. Thornton, Civil Surgeon of Arrah, one of the subscribing witnesses to the said instrument, verified the petition, as laid down in s. 248, Act X of 1865. Upon this petition an order was passed, directing "advertisements to be made at the Collectorate and at the Civil Courts of the district. Notice also to be served on parties to suits before the Subordinate Judge, in which Desputty Singh was concerned. This application to come up on the first miscellaneous day after Mr. Palmer takes charge, say Saturday the 24th July." This order was passed by Mr. Geddes.

Baijnath Shahai and others the appellants are the creditors of Baboo Reetbhunjun Singh; and they objected to the grant of the probate, on the ground that Desputty Singh was not the heir of the late Bindessurree Singh, but that their debtor Reetbhunjun was.

It appears that notices were issued by the Subordinate Judge of the district, dated the 20th July 1875, calling upon Baijnath Shahai and others to file any objections they might have to make in the matter of the petition of Abdool Hye before the Judge of the district on or before the 22nd of July 1875. They appeared and filed their objections. The Judge, on the 9th of August, after considering the objections of Baijnath Shahai and others, passed the following order—"That letters of administration will be granted by this Court to Moulvie Abdool Hye, petitioner, as manager and next friend to Baboo Desputty Singh, minor, on his undertaking to make a true inventory of the property and credits of the late Baboo Bindessurree Pershad Singh deceased, and to exhibit the same in this Court at or before the expiration of one year next ensuing, and to render

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a true account thereof, and also on his filing a bond with two sureties engaging for the collection, getting in and administering the estate of the deceased Baboo Bindessurree Pershad Singh. Each party to pay their own costs."

On the case coming before us, it was contended by the learned Advocate-General for the respondent that the appellants ought not to have been made parties to these proceedings, and he asked the Court to dismiss the appeal without hearing their Counsel or entering into the merits. We were of opinion that as the appellants were made parties to the proceedings by the action of the Court and were called upon to file their objections, and did file them without any objection on the part of the respondent, we ought to hear the appeal. We therefore called upon the learned Counsel Mr. Kennedy, who appeared for the appellants, to satisfy us that his client was in a position to oppose the grant of probate of the estate of the late Baboo Bindessurree Pershad Singh. After hearing his argument and that of the learned Advocate-General for the respondent, we are of opinion that the appellants ought not to have been permitted to object in the lower Court to the grant of probate.

Numerous cases in the English courts were cited by the learned Counsel on both sides; but, in deciding this case, we have not to look to what is or was the English law on the subject—we must look to the Act itself, Act X of 1865, as the law applicable to the case—*De Souza* v. *The Secretary of State* (1).

The application for probate having been formally made, it was lawful for the District Judge, under s. 250, Act X of 1865, to issue citations, calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. The citation to be fixed up in some conspicuous part of the Court-house, and also in the office of the Collector of the district.

No caveats, on the part of the appellants before us, had been lodged against the grant of probate or letters of administration. The Judge, therefore, acted illegally in directing notices to be

(1) 12 B. L. R., 423, at p. 427, *per* Macpherson, J.

served on the appellants through the Subordinate Judge of the district, inviting them to file any objections they might have to make against the grant of probate. The appellants cannot be said to be parties "having any interest in the estate of the deceased" within the meaning of s. 250 of the Act. The appellants, who are the creditors of Reetbhunjun Singh, who, in the event of Baboo Bindessurree Singh having died without executing a will, and without having adopted Baboo Desputty Singh, on whose behalf the application for probate was made, he being a minor, may be the heir of the late Baboo Bindessurree Singh, but that does not entitle them to claim as of right as interested in the estate of Baboo Bindessurree Singh to oppose the grant of probate or letters of administration.

The order granting letters of administration to the respondent is affirmed, such order however being without prejudice to the appellants who have no present right to oppose such grant, nor precluding them from seeking any further remedy they may be advised to pursue as against their debtor Reetbhunjun Singh.

The appeal is dismissed with costs.

BIRCH, J.—I also am of opinion that those who, in the petition of appeal, style themselves "opposite parties," ought not to have been allowed "to come and see the proceedings before the grant of letters of administration."

Section 250 contemplates the citation of those directly interested in the estate of the deceased. Its provisions cannot, I think, be strained to include creditors of the next-of-kin to the deceased. It is admitted that the appellants are not the only creditors of Reetbhunjun, but that there are several other creditors, and, if the appellants had succeeded in their opposition to the granting of letters of administration, they would not be in any better position than other creditors of Reetbhunjun.

We have to be guided by the provisions of Act XXI of 1870 and those sections of Act X of 1865 which are by the former enactment declared to apply to wills made by Hindus after 1st September 1870. I do not think it incumbent upon us to consider what the law and practice were antecedent to the law

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by which we have to be guided. Nor do I think it necessary to discuss in a case such as we have before us the English cases cited by Mr. Kennedy. I would only remark that no case which has been cited supports the learned Counsel's contention, that a creditor, not of the deceased, but of his next-of-kin, is a person interested in the estate of the deceased and entitled to come in and controvert a will said to have been executed by the deceased. It has been held on the Original Side of this Court in *De Souza* v. *The Secretary of State* (1), that, since the passing of Act X of 1865, the courts in this country must look to that Act and it alone for the law of British India applicable to all cases of testamentary or intestate succession; and the correctness of that ruling has never been impugned.

Then as to the argument of the learned Counsel, that his client is barred from taking any further steps against the estate, and prejudiced by having been made a party to these proceedings, I find nothing in the Act which leads me to conclude that this argument has any foundation. By s. 242, letters of administration are conclusive as to the representative title of the person who obtains them, and creditors of the deceased must look to him for satisfaction of their debts. If the appellants have any claim against the estate of the deceased, I fail to see how they can be deprived of their remedy by an order granting letters of administration.

What we now decide is, that the Judge was wrong in citing the appellants to see the proceedings, and that they have no right to oppose the granting of letters of administration. We cannot, on their appeal, go into the merits of the case. The result is, that the appeal must be dismissed with costs.

Appeal dismissed.

(1) 12 B. L. R., 423.

Before Mr. Justice Markby and Mr. Justice Mitter.

LUCHMI DAI KOORI (PLAINTIFF) *v.* ASMAN SING AND OTHERS (DEFENDANTS) *

1876 *June 7.*

Hindu Law—Mitakshara—Purchaser at sale in Execution of Decree of Joint Family Property—Usurious Rate of Interest—Form of Decree against Mortgaged Property.

In a suit by a Hindu, subject to the Mitakshara law, against certain auction-purchasers at a sale in execution of a decree against the father, to recover a portion of the ancestral estate by cancellation of the sale, it appeared that the property which was mortgaged by the bond upon which the decree was passed was not put up for sale. The decree provided "that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond," and it also allowed interest at about 50 per cent, the rate in the bond, to the decree-holders. It was contended on behalf of the plaintiff that, upon a proper construction of the Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall* (1), the decree under which the property had been sold was an improper one. *Held* that, under the Privy Council Ruling, the purchaser is not bound to look beyond the decree. *Held* also, that an usurious rate of interest cannot be treated, within the principles of the above case, as showing that the decree was for a debt which the son was not bound to discharge.

Held further, that where a decree is against the mortgagor generally, coupled with a declaration of the lien, the decreeholder may proceed either against the person and his property or against the mortgaged property, though whether such a course will be allowed in any particular case is a matter for the discretion of the Court executing the decree.

SUIT to recover possession of a moiety of a certain estate by cancellation of an auction-sale, held on the 12th of February, 1866.

The material facts alleged in the plaint were as follows:—That the plaintiff, with the defendant Govind Dyal Sing, who was his father, constituted a joint Hindu family living under the Mitakshara law; that the property, which was the subject-matter of the suit, was ancestral property, to which

* Regular Appeal, No. 104 of 1875, against a decree of Baboo Mothooranath Goopta, First Subordinate Judge of Zilla Bhaugulpore, dated the 18th of January, 1875.

(1) 14 B. L. R., 187.

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Govind Dyal Sing succeeded in 1846; that the estate was totally unencumbered at that time, and that the income "was not only sufficient for family expenditure, but probably sufficient to ensure a saving;" that the plaintiff was born in the year 1858, when he became entitled to a share in the joint estate; that the defendant Govind Dyal Sing, without any legal necessity, executed a bond in favor of certain bankers of the names of Dúngur Mal and Sheo Lall, for Rs. 2,800, mortgaging certain villages other than those sued for; that, subsequently, the mortgagees obtained a decree for the sale of the mortgaged properties, but instead of executing the decree by sale of those properties, they put up for sale the right and interest of the defendant Govind Dyal Sing in the properties for the recovery of a moiety of which the present suit was brought, and at that sale the defendant Asman Sing was the purchaser.

The defendants, in their written statement, stated that the debt in respect of which the property was put up for sale was contracted by the plaintiff's father for the purpose of purchasing, for the benefit of the joint family, a certain share in an estate belonging to one Roghuber Dyal Sing, another member of the family; and that, consequently, the plaintiff was not entitled to question the validity of their purchase in execution of decree for such debt.

That decree was worded in the following terms: "that the claim be decreed; that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond." The interest allowed upon the bond amounted to Rs. 1,630 for a period less than a year in respect of the sum of Rs. 2,800, giving a rate of more than 50 per cent. per annum.

The Subordinate Judge, without in any way going into the facts of the case, held, upon the strength of the Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall* (1), that the decree under which the defendants purchased the property was conclusive, and, as *bonâ fide* purchasers for valuable consideration,

(1) 14 B. L. R., 187.

they were not bound to enquire whether the original debt was for a valid necessity. He, accordingly, dismissed the suit.

The plaintiff appealed to the High Court.

Mr. *Ameer Ali* (Baboo *Mohesh Chunder Chowdry* with him) for the appellant.

The *Advocate-General*, offg. (Mr. *Paul*) (Messrs. *Twidale* and *Sandel* and Munshi *Mohammed Yusooff* with him) for the respondents.

Mr. *Ameer Ali.* — The Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall* (1) does not lay down any such hard and fast rule as the Subordinate Judge supposes. Prior to this decision, the Courts had almost invariably held that the burden of proof lay primarily with the purchaser—*Mahabeer Persad* v. *Ramyad Singh* (2) and *Laljeet Singh* v. *Rajcoomar Singh* (3). The Privy Council Ruling does not do more than simply change the onus and transfer it in the first place to the son. If the plaintiff makes out a *primâ facie* case, and proves sufficiently that the debt for which the property was sold was not for a valid purpose, the same liabilities would attach to the purchasers as before. Every member of a Hindu joint family has an inherent right to question the validity of acts committed by the managing member so as to bind the joint estate—*Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonweree* (4). The Privy Council cannot be supposed to mean that whenever such property has passed into the hands of auction-purchasers, such members should be for ever precluded from questioning the validity of not only the original acts but also of the decree and sale under it. No doubt, if the Judicial Committee had stopped at the words, "a purchaser under an execution is surely not bound to go beyond the decree, &c." (5), such construction might have been placed on their ruling; but their Lordships go on and say, "the purchaser under that execution

(1) 14 B. L. R., 187.
(2) 12 B. L. R., 90.
(3) *Id.*, 373.
(4) 6 Moore's I. A., 393.
(5) 14 B. L. R., 199.

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was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them" (1). Some meaning must be attached to those words, and the only reasonable construction that can be given to them is, that, when ancestral property is put up for sale in execution of a decree against the father, the purchaser is not bound to look to the character of the debt, but he is not freed from the burden of examining into the character of the decree, to see whether it is a proper or improper one; and, on the other hand, though the son is debarred from questioning the validity of the acts leading up to the decree, he retains his right to question the propriety of the decree and the subsequent proceedings under it. If this is the correct view, then, upon the face of the decree, it appears the decree-holders were bound to proceed first against the mortgaged properties; and they would have only been entitled to proceed against any other property of the judgment-debtor, in case there happened to be a deficiency. A decree-holder, who takes a decree as against the hypothecated property, should, on equitable principles, be made to exhaust it. The facts proved show that the debt was an immoral one. The following cases were also cited—*Tooke* v. *Hartley* (2), *Perry* v. *Barker* (3), *Budree Lall* v. *Kantee Lall* (4), and *Cheyt Narain Sing* v. *Bunwari Singh* (5).

Baboo *Mohesh Chunder Chowdry* on the same side.—Upon the face of the decree it appears that interest over 50 per cent. per annum was claimed by and allowed to the decree-holder. It is usurious; and, as usury is prohibited by the Hindu law, the decree is an improper one; Cowell's Lectures on Hindu Law for 1871, pp. 307, 311.

The *Advocate-General* for the respondents.—The plaintiff is concluded by the Privy Council Ruling from questioning the validity of his father's acts when once a decree has been passed

(1) 14 B. L. R., 200.
(2) 2 Bro. Ch. C., 125.
(3) 8 Ves., 527.
(4) 23 W. R., 260.
(5) *Id.*, 395, at p. 398.

and the property sold under it. With reference to the propriety of the decree itself, the bond in this case hypothecates not only certain properties, but also makes the person of the debtor responsible for its payment. The decree is in the form usual in the mofussil, under which a decree-holder proceeds either against the mortgaged property or the debtor personally. The decree-holders in this case were, therefore, not bound to exhaust the hypothecated properties. The evidence shows the debt was contracted for a valid purpose—*Muddun Thakoor* v. *Kantoo Lall* (1), *Mussamut Koldeep Kour* v. *Runjeet Singh* (2), and *Gridhari Lall Sahoo* v. *Mussamut Gowrunbutty* (3).

Mr. *Ameer Ali* in reply.

The judgment of the Court was delivered by

MARKBY, J. (who, after stating the facts, continued):—The Subordinate Judge took evidence in the case, but eventually without in any way going into the evidence held upon the strength of a decision of the Privy Council in the case of *Muddun Thakoor* v. *Kantoo Lall* (1), that the decree under which the defendant purchased this property was conclusive in the matter, and that the defendant was not in any way bound to inquire further when this decree was existing.

Against this judgment the plaintiff appeals, and he contends, in the first place, that the Privy Council case relied on does not make the decree conclusive in the way the Subordinate Judge has held it to be; secondly, he contends that upon the evidence he has made out his case that this was a debt for which his interest in the property could not in any way be made liable; and thirdly, he contends that, under the terms of the decree itself, the property which should have been first sold in satisfaction of the decree was the property which had been mortgaged, and that, therefore, applying the Privy Council decision in all its strictness, the purchaser had notice upon the face of the decree that this property could not be sold.

(1) 14 B. L. R., 187. (2) 24 W. R., 231.
(3) 15 B. L. R., 264.

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Now, with regard to the first point, we think that the decision of the Subordinate Judge is right. The case that we have to deal with here is, for all material purposes, precisely the same as that which was dealt with by the Privy Council—in what is called the "second appeal" in the case referred to—the appeal of Muddun Mohun Thakoor, whose position was precisely that of the present defendants. The Privy Council say, speaking of the purchaser in that case:—"He found that a suit had been brought against the two fathers; that a Court of Justice had given a decree against them in favor of a creditor; that the Court had given an order for this particular property to be put up for sale under the execution; and, therefore, it appears to their Lordships that he was perfectly justified within the principle of the case of *Hunooman Persaud Panday* v. *Mussamut Babovee Munraj Koonweree* (1) in purchasing the property, and paying the purchase-money *bonâ fide* for the purchase of the estate."

Here also there had been a decree of a Court of Justice against the father for this money, and an order of the Court that this property should be put up for sale.

Then their Lordships quote a well-known passage from the case referred to (2), and then they say as follows:—"The same rule has been applied in the case of a purchaser of joint ancestral property. A purchaser under an execution is surely not bound to go back beyond the decree to ascertain whether the Court was right in giving the decree, or, having given it, in putting up the property for sale under an execution upon it. It has already been shown that, if the decree was a proper one, the interest of the sons, as well as the interest of the fathers, in the property, although it was ancestral, was liable for the payment of the father's debts. The purchaser under that execution, it appears to their Lordships, was not bound to go further back than to see that there was a decree against those two gentlemen; that the property was property liable to satisfy the decree, if the decree had been given properly against them" (3).

(1) 6 Moore's I. A., 393. (2) *Id.*, 423. (3) 14 B. L. R., 199, 200.

Now it is contended upon those last words, that the intention of the Privy Council was that a purchaser at an execution sale should not only see that there was a decree, but that a decree had been rightly given against the judgment-debtor. That would be really unsaying all that the Privy Council had just before said upon the matter. What we think the Privy Council mean by those words is, that a party is not bound to look beyond the decree to see that that was a right decree, for they had said already just the contrary that he was not bound to do so, but he was bound to look to the decree to see that in point of form it was a proper decree. Then that being so, no objection can be taken in point of form to this decree, except the one which was taken by Baboo Mohesh Chunder Chowdry with which we have to deal now.

He contends that, even giving the Privy Council decision that interpretation, the purchaser was not bound in any way to go behind the decree to see what occurred prior thereto, still he was bound to look to the decree itself and as it stands; there was notice to him on the face of the decree that this was a debt which, under the Mitakshara law, the son was not liable to discharge, and for this reason, because it appears upon the face of the decree, that the interest, which was allowed upon this bond, amounts to somewhere about Rs. 1,600 for a period less than a year in respect of a principal of Rs. 2,800, giving a rate of interest somewhere over 50 per cent.

But, even assuming that the Hindu law contains a prohibition against the taking of interest at so high a rate, and that by the Hindu law interest at that rate could not under any circumstances be allowed, still we think that that is not a circumstance which within the principles laid down by the Privy Council in the case quoted above, can be treated as showing that this was a decree for a debt which the son was not bound to discharge. For that purpose, we must look into what the cases under the Mitakshara law are in which he is not bound to discharge the father's debt. That is expressed by the Privy Council in these words :—

"It is necessary, therefore, to see what was the nature of the debt for the payment of which it was necessary to raise money

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by the sale of the property in question" (1). Now all we know, and all we can know, is what appears on the face of the decree itself. Their Lordships go on to say:—"If the debt of the father had been contracted for an immoral purpose, the son might not be under any pious obligation to pay it; and he might possibly object to those estates which have come to the father as ancestral property being made liable to the debt. That was not the case here. It was not shown that the bond upon which the decree was obtained was given for an immoral purpose; it was a bond given apparently for an advance of money upon which an action was brought" (1).

Can we say here upon the face of the decree, that, so far as it orders interest to be paid, it is a decree for an immoral purpose? One might almost say that such a question answers itself. It may be that, under Hindu law, there were some restrictions against the allowance of interest; but it is well known that those restrictions are no longer enforced by our Courts. There is no ground whatever for saying that what our Courts allow in the shape of interest is money directed to be paid for immoral purposes. Therefore, upon that ground, it appears to us impossible to say, that, on the face of the decree, it was one for a debt which the son was not bound to discharge.

This view of the case renders it unnecessary to consider the facts of this case; but, having heard the case very ably argued on behalf of the appellant, we think even upon the facts of the case that this was a debt which the son was bound to discharge.

* * * * * * * *

Therefore, upon the evidence, if one was at liberty to go into the evidence, we should hold that the debt was one which, under the Mitakshara law, the son was bound to discharge.

Then the other question remains, namely, as to the form of the decree. Now we had the decree read to us, and we consider this to be not such a decree as we know is sometimes made, namely, a decree restricting the parties in the first instance to the sale of the mortgaged property. But it is a decree against the mortgagor generally coupled with what is

(1) 14 B. L. R., 197.

called a declaration of the lien—a declaration which it is exceedingly common to insert in decrees against mortgagors upon a bond of this nature. The bond also, as has been pointed out by Mr. Advocate-General, was not only a bond pledging the property, but a bond which made the party personally liable for the money. Now, upon a decree of that kind, we have no hesitation in holding that a person may in law proceed either against the person or against the mortgaged property specified in the decree. In saying that we do not at all mean to say that that is a course which in all cases ought to be allowed. There are undoubtedly cases in which that would operate greatly to the injury of the mortgagor. And we desire to say nothing which would in any way interfere with the discretion of the Court executing the decree to take such precaution as might be necessary against any injury of that kind. But we think that in the present suit no inquiry upon such a subject as that can take place. I have already quoted the passage from the Privy Council judgment, which points out the duty of a purchaser at an execution sale in such a case as this. We think that, under the law as there laid down, the purchaser had a right to assume that the property, which was sold at this sale, was liable to be sold under this decree, and that any questions which the judgment-debtor might have raised or did raise upon the order by which the property was brought to sale, were disposed of at the time when the sale was ordered to take place. Therefore whatever may be the judgment-debtor's right under such a decree as this, that question cannot be raised now as against the person who has purchased at a sale under a decree of Court. Therefore that ground also fails.

The result is that the regular appeal must be dismissed with costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Ainslie.

1876 *Dec.* 19.

BRAMMOYE DASSEE ON BEHALF OF BROJO NATH SINGH AND ANOTHER (PLAINTIFFS) *v.* KRISTO MOHUN MOOKERJEE (DEFENDANT).*

Res Judicata—Act VIII of 1859, *ss.* 2 *&* 170—*Hindu Widow—Reversioner.*

A, a Hindu widow, brought a suit to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow, her daughter sued the same defendant on behalf of her two minor sons, as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit: the defendant was summoned as a witness, but failed to attend. *Held*, that the suit was not barred under s. 2, Act VIII of 1859, as being a *res judicata*, until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow, but the reversioners. The defendant having failed to attend and give evidence on this point, the Court was justified in giving the plaintiff a decree under s. 170, Act VIII of 1859.

THE facts of this case were shortly these:—A certain property, which originally belonged to three brothers, forming a Hindu joint family, was sold in execution of a decree against two of them, and was purchased by the defendant, who obtained possession. The widow of the third brother thereupon instituted a suit to recover her husband's share in the joint estate. The plaintiff in that suit, after having partially examined one of her witnesses, declined to proceed further with their examination, and cited the defendant as a witness, and on his failure to attend, her suit was dismissed. No appeal was preferred from that order, and the widow died some time after, leaving a daughter, who was the plaintiff in the present suit, and who sued now on behalf of her minor sons, as reversioners to their grandfather's share, to recover the one-third share which was the

* Special Appeal, No. 217 of 1876, against a decree of J. Tweedie, Esq., Officiating Judge of Zilla West Burdwan, dated the 13th of November, 1875, reversing a decree of Baboo Gobind Chund Ghose, Munsif of Bissenpore, dated the 21st of July, 1875.

subject-matter of the former suit. The defendant, among other grounds, pleaded that the suit was barred under s. 2 of Act VIII of 1859. He was cited in this case also as witness on behalf of the plaintiff, but failed to attend. The Munsif decreed the claim, under s. 170 of Act VIII, 1859, holding that the cause of action in the former suit was not heard and determined so as to operate as a bar to the present action. On appeal, the Judge reversed the Munsif's order, holding that the former action was a *res judicata*.

The plaintiff preferred a special appeal to the High Court.

Baboo *Nilmadhub Sen* for the appellants.

Baboo *Bhobany Churn Dutt* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—In this case we think the judgment of the first Court was a right judgment, and ought not to have been disturbed by the lower Appellate Court.

It appears that there were three brothers entitled to a certain property. A decree had been obtained against two of the brothers, Shib Prosad and Bhola Nath. Their rights and interests in the property were sold, and the defendant got into possession. The widow of one of the brothers then brought a suit for declaration of her title to one-third share of the property. An issue was raised whether that share was the right and interest of the plaintiff as alleged by her, or of Shib Prosad and Bhola Nath as alleged by the defendant. There were other parties to that suit, but that does not seem to be material. After the death of the widow, the heir of her husband brought the present suit for possession. The decree in the former suit was set up as a bar to the present suit; and an issue was raised whether or no that decree was a bar to the present suit.

The Munsif, who tried the suit, seemed to have had some doubt whether, in point of law, the former decree was a bar to this suit. He also held that there was no proper trial upon the issues raised in the former suit. He then went on to say

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that the plaintiff, in the present suit, had relied mainly upon the evidence of the defendant; and, inasmuch as the defendant having been summoned did not choose to appear in Court, he gave the plaintiff a decree under s. 170 of the Civil Procedure Code.

The District Judge entirely concurs with the Munsif in thinking that this is a proper case to be dealt with under that section; but thinks that section could not be applied to the present case, because in this case the plaintiff cannot show a legal right. What he means by that apparently is, that the legal right which the plaintiff sets up in this case is wholly barred by the decision in the former suit. But the District Judge seems to have overlooked this,—that there was in the present case not an absolute bar such as there would have been, if this were the case of a decree against the person through whom the plaintiff claims. The rule that a decree against the widow binds the reversioner is subject to this qualification, that there has been a fair trial of the right in the former suit. That is laid down in what is commonly called the *Shivagunga case* (1) and in the decision of this Court to the same effect, with which I entirely concur, in the case of *Mohima Chunder Roy Chowdhry* v. *Ram Kishore Acharjee Chowdhry* (2). It was there pointed out that the Privy Council, in a more recent case (3), have said that, while they adhere to the rule that the widow represents the estate of the reversioner for some purposes, it is her duty not only to represent the estate, but to protect it also.

Now, in this case, it is obvious that there were some grounds for looking closely to see what really took place in the former suit, because we find that the former suit was disposed of in a manner which, on the face of it, seems to be not satisfactory. The plaintiff in that suit, after having brought her suit, and after having partially examined one witness, declined to examine any of her other witnesses. She had also cited the defendant,

(1) 9 Moore's I. A., 539. (2) 15 B. L. R., 142; *vide* p. 159.

(3) *Nogender Chunder Ghose* v. *Sreemutty Kaminee Dossee*, 11 Moore's I. A., 241.

the same person who was cited to appear in this case. It does not, however, appear whether she made any real attempt to get the defendant into Court, or whether the summons was served upon him. Anyhow he never came into Court, therefore there was good ground for inquiring whether there was a fair trial of the question between the parties in the former suit, and whether the plaintiff performed her duty in protecting, not only her own interest, but the interests of the person who was to take after her death.

Upon that question the evidence of the defendant is most important. Therefore the Court has a perfect right to say that the decree in the former is not a bar to this suit, until there had been some inquiry as to how it was obtained. And the defendant refusing to come in to give his evidence upon that point, the Court would be justified in dealing with the case under s. 170 of Act VIII of 1859. We may assume for the purposes of this judgment that the decree in the former suit would have been a bar to the present suit, if it had been properly obtained; but that would not in any way prevent the Court from inquiring into the question whether it was so or not. Having regard to the circumstances which I have mentioned, the Munsif was right in dealing with the case under s. 170. We think, therefore, that the judgment of the first Court was right and ought to be restored, and that of the lower Appellate Court reversed. The plaintiff will get the costs in this Court and in the lower Appellate Court.

Appeal allowed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

THE EMPRESS OF INDIA *v.* DILJOUR MISSER.*

1877
Feb. 20.

Conviction of offence committed before the Penal Code came into operation—Regulation IV of 1797—*Act XVII of* 1862—*Act I of* 1868 (*General Clauses Consolidation Act*), *s.* 6.

The prisoner was found guilty and sentenced under Regulation IV of 1797 to transportation for life, for a murder committed in 1861, before the Penal

* Criminal Reference, No. 176 of 1876, from an order of A. V. Palmer, Esq., Sessions Judge of Shahabad, dated the 7th August, 1876.

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Code came into operation; and the case was sent up to the High Court to confirm the sentence. Regulation IV of 1797 was repealed by Act XVII of 1862, and that Act was wholly repealed by Acts VIII of 1868 and X of 1872. *Held*, on a reference to a Full Bench, that the conviction was illegal, s. 6 of Act I of 1868, which provides that the repeal of any Act or Regulation shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable.

THE prisoner was charged with murder, alleged to have been committed on 24th May 1861, before the Penal Code came into force, and he had evaded arrest up to the time of his apprehension. The prisoner was, on 7th August 1876, found guilty by Mr. A. V. Palmer, Sessions Judge of Shahabad, of culpable homicide not amounting to murder, and sentenced to transportation for life. The case was referred by the Judge under Regulation IV of 1797, s. 3, for the orders of the High Court, and on its coming before Markby and Ainslie, JJ., the following note was made thereon by those Judges:—

"Regulation IV of 1797 was repealed by Act XVII of 1862 with some reservations, but as appears by a case (1) just decided,

(1) *R.* v. *Lall Shaha. Criminal Appeal, No.* 438 *of* 1876. In this case the prisoner was convicted in May, 1876, of robbery committed in 1857, under s. 3, Regulation LIII of 1803, and s. 3, Regulation XVI of 1825, and was sentenced, under s. 395 of the Penal Code, to seven years' rigorous imprisonment. His appeal came before Markby, Ainslie, and Mitter, JJ, on 17th August, 1876, when the following judgment was delivered:—

MARKBY, J.—In this case the prisoner has been tried for robbery by open violence, and sentenced to seven years' rigorous imprisonment, under Regulation LIII of 1803, s. 3, and Regulation XVI of 1825, s. 3. He has appealed to this Court, and his first ground of appeal is, that those Regulations having been repealed, the conviction is illegal. These Regulations were repealed by Act XVII of 1862 with a certain saving as to past offences. Act XVII of 1862 was repealed by Act VIII of 1868, except ss. 3, 4, 5, and 6. These sections were repealed by the Code of Criminal Procedure of 1872. It would, therefore, seem that this ground of the prisoner's appeal is well founded. From another case of a somewhat similar character, which is now before us, we gather that there is an opinion prevalent in the Courts of the country, that the old criminal laws antecedent to the Penal Code have not been swept away to the extent to which they appear to us to have been on a perusal of the Statutes above referred to. We regret that we have had no assistance on behalf of the Crown in the investigation of this matter, but as far as we are able to judge upon the information before us, this conviction appears to be illegal, and we order it to be set aside, and the prisoner discharged.

those reservations have been also repealed, so that the Sessions Judge was not empowered to make the reference he has done. Nor are we aware of any regulation in existence under which the prisoner could be punished for culpable homicide committed on the 24th of May 1861. Unless, therefore, some cause be shewn to the contrary, the conviction must be set aside as illegal."

Notice was ordered to be given to the Government Pleader and to the prisoner, and the case subsequently came before Markby, Ainslie, and Mitter, JJ., who referred it to a Full Bench with the following remarks:—

"In a case which came before this Court on appeal a short time ago, it was held by us that Act XVII of 1862 was totally repealed by Acts VIII of 1868 and X of 1872, and that therefore no conviction for an offence committed prior to 1862 could be maintained. That case was not argued, and we were therefore only able to express our opinion with reference to such research as we could ourselves make into the matter. Very shortly afterwards the present case was referred to us under Regulation IV of 1797, s. 3, to confirm a sentence passed by the Sessions Judge of Shahabad, for an offence committed on the 24th May 1861. We, accordingly, gave notice that we should again consider this question, and the Junior Government Pleader has appeared to argue it. He maintains that, notwithstanding the repeal of Act XVII of 1862, the prisoner may be still tried and punished, because of the proviso in s. 6 of the General Clauses Act (I of 1868). We find considerable difficulty in coming to a conclusion as to the operation of this section in the present case, and as the question is one of general importance, it should, we think, be heard by a Full Bench."

No Counsel appeared on either side before the Full Bench.

The opinion of the Full Bench was delivered by—

GARTH, C.J.—In this case the prisoner has been convicted of culpable homicide not amounting to murder committed on the 24th May 1861, and sentenced to transportation for life. Act XVII of 1862, under which the prisoner has been tried

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and convicted for this offence, has been totally repealed by Acts VIII of 1868 and X of 1872. It has, however, been contended that, notwithstanding this total repeal of Act XVII of 1862, the prisoner may still be tried and convicted under that Act by virtue of the provisions of s. 6 of the General Clauses Act (I of 1868). We have considered this clause, and upon the whole we think that it does not apply to the present case. The conviction, therefore, must be set aside, and the prisoner discharged.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

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MORAN AND OTHERS (PLAINTIFFS,) *v.* MITTU BIBEE AND OTHERS (DEFENDANTS).

Appeal to Privy Council—Act VI of 1874, *s.* 5—*Substantial Question of Law.*

The substantial question of law which, by s. 5, Act VI of 1874, the appeal must involve, in order to give an appeal to the Privy Council in a case where the decree appealed from affirms the decision of the Court below, is not limited to a question of law arising out of the facts as found by the Courts from whose decisions it is desired to appeal. A question of law arising on the evidence taken in the case is, without reference to the findings of the lower Courts, sufficient to found an appeal.

APPLICATION on notice for a certificate under Act VI of 1874 for leave to appeal to Her Majesty in Council from the judgments and decrees made in the suit by the Appeal Court (Garth, C. J., and Macpherson, J.) on the 15th September, and by the Original Court (Phear, J.,) on 6th March 1876. The judgment of the Original Court was in favor of the defendants, and that decision was upheld by the Appeal Court, who dismissed the appeal. The facts of the case, together with the judgments of both Courts, have been already reported (1).

(1) I. L. R., 2 Calc., 58.

The petition for leave to appeal, after stating the facts, and that the case came on for hearing before Phear, J., and was dismissed by him, continued:—

"Upon such hearing it was (*inter alia*) contended in argument on behalf of your petitioners, in support of their claim to priority over the Mussamut defendants in respect of your petitioners' said advances, that the principles upon which advances and outlay made by a consignee or manager of a West India Estate have been held entitled to a priority over other charges upon the property, were applicable to the said advances made by your petitioners. Also, that such last mentioned advances were of the nature of salvage; and further that they were analogous to advances made on the security of bottomry and respondentia bonds by hypothecation of ships and their cargoes, and that the legal principle governing these latter securities, *viz.*, that the latest in date is first payable, was applicable to the said advances made by your petitioners. It was also further contended on behalf of your petitioners, that the Mussamut defendants had acquiesced in your petitioners making such advances upon the terms of the same being entitled to priority over their own mortgage, and that they were estopped under the circumstances of the case, and by their own conduct, from denying your petitioners' claim to such priority.

"That in and by his judgment upon which the said decree is founded and based, the said learned Judge found and held (*inter alia*):—

(*a.*) That your petitioners made advances to the said J. McRae, as such manager as aforesaid, during the year 1873, on account of the outlay of the said Arrowah Concern, to the amount of Rs. 88,557, upon the security of assignments of 360 maunds of indigo, portion of the crop of that season, the subject of the mortgage of the Mussamut defendants of the 1st February, 1873; and that such advances, or a portion of them, were applied to the purpose of manufacturing the indigo, which was the subject of the suit, that is to say, the said 360 maunds of indigo.

(*b.*) That the suggested analogy to the several cases of advances or outlay by the consignee or manager of a West

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India Estate, of salvage payments, and of advances on bottomry and respondentia bonds, could not be maintained.

(c.) That it was not proved that the said J. McRae had authority from the Mussamut defendants to give your petitioners a charge on the said indigo having priority over the said defendants' said mortgage; that the alleged arrangement and agreement that the said J. McRae should borrow such further sums as might be necessary for carrying on the said concern from your petitioners, and should grant your petitioners a first mortgage or charge upon so much of the season's crop as should be necessary to secure your petitioners' advance, and that the Mussamut defendants should waive their priority in favor of your petitioners, if in fact made, were inadmissible in evidence by force of ss. 91 and 92 of the Indian Evidence Act, as contradicting, and materially altering, the contract made by the said mortgage of the first day of February, 1870; that the Mussamut defendants had not acquiesced in your petitioners making their said advances upon the terms of the same being entitled to priority over the said mortgage, and that the said defendants were not estopped from denying your petitioners' claim to such priority.

"The said learned Judge, at the said hearing and trial, and also in his said judgment, ruled and held that the said assignments given to your petitioners as security for their said advances were insufficiently stamped, and were therefore inadmissible in evidence, and the same were consequently not adduced in evidence at the said hearing and trial; but the said learned Judge, in his said judgment, held and stated that the said assignments could not, upon the case made by your petitioners, have the effect of passing to your petitioners an interest in the indigo detrimental to the Mussamut defendants' prior rights under their said mortgage of the first day of February, 1873."

After stating that the petitioners appealed from the judgment of Phear, J., that the appeal was dismissed, and that they were desirous of appealing to Her Majesty in Council, the petition set forth, *inter alia*, the following grounds of appeal:—

1. "That the said learned Judges held erroneously, that evidence was inadmissible of an oral agreement and certain

other communications with reference thereto between the said John McRae and the said Monohur Doss, that advances should be taken from the petitioners on account of the outlay of the Arrowah Indigo Concern, to be secured by a first charge upon the indigo of the season of 1872-73, to be manufactured at the said concern, such charge to have priority over the mortgage of the said indigo to the Mussamut defendants, dated the 1st day of February, 1873.

2. That the said learned Judges ought to have held that the said John McRae was authorized by the said Mussamut defendants to raise the money necessary to complete the indigo season of 1872-73 of the said concern as a first charge on the indigo manufactured at the said concern in that season, in priority to the said defendants' mortgage; and that the said John McRae raised the money sought to be recovered in this suit from the petitioners in pursuance of such authority.

3. That the said learned Judges ought to have held that the said Mussamut defendants knew of the said John McRae's action in raising the said money as a first charge with such priority as aforesaid, and acquiesced therein.

4. That the said learned Judges ought to have held that the said Mussamut defendants were estopped, under the circumstances of the case, and by their own conduct, from denying your petitioners' claim to such priority.

5. That the said learned Judges ought to have held that, under all the circumstances of the case, the petitioners were entitled in equity to be recouped their advances on account of the said concern out of the said indigo in priority to the said Mussamut defendants, whereas they have not so held.

6. That the said learned Judges ought to have held that the petitioners were entitled to be recouped the sum of Rs. 5,000 (part of the money sought to be recovered in this suit), which was obtained from the petitioners, and paid to the said Mussamut defendants, out of the said indigo, in priority to the said Mussamut defendants."

The petition prayed for a certificate that the amount or value of the subject-matter of the suit, and also the amount or value of the matter in dispute in the appeal to Her Majesty in

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Council, were respectively upwards of Rs. 10,000, and that such appeal involved substantial questions of law.

Mr. *Evans*, for the plaintiffs, applied for a certificate to that effect under Act VI of 1874.

Mr. *Bonnerjee*, for the defendants, admitted, that if it were assumed that the facts were not correctly found by the Court, there were substantial questions of law involved in the case: but he contended that it ought not to be assumed that the facts were inaccurately found, and that according to the true construction of the Act "the substantial questions of law" must arise from the facts as found. [PONTIFEX, J.—Your contention amounts to this, that the appeal to the Privy Council, when the Appellate Court agrees with the Court of first instance as to the facts, is in the same position as a special appeal to this Court.] Yes. My contention is, that "substantial questions of law" must be involved in the facts as found, and that the Legislature did not intend to allow an appeal in cases where, if the facts were differently found, questions of law might arise.

PONTIFEX, J.—I think, in this case there is a substantial question of law within the meaning of the 5th section of Act VI of 1874. If it had been intended to restrict appeals to questions of law arising only out of the facts concurrently found by the Courts below, it would have been expressly so stated in the Act. The application must be granted. Costs to follow costs of appeal to the Privy Council.

Attorneys for the plaintiffs: Messrs. *Berners, Sanderson*, and *Upton*.

Attorney for the defendants: Baboo *Nemy Churn Bose*.

PRIVY COUNCIL.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

RAM COOMAR COONDOO AND ANOTHER (PLAINTIFFS) *v.* CHUNDER CANTO MOOKERJEE (DEFENDANT).

P.C.*
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June 30, *July* 1, 24, *and Nov.* 25.

Champerty and Maintenance—Agreements contrary to Public Policy—Action for improperly putting the law in motion—Malice—Want of reasonable and probable cause—Application under s. 73, *Act VIII of* 1859—*Costs.*

The English laws of maintenance and champerty are not of force as specific laws in India either in the mofussil or in the Presidency towns. The ground on which contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is that they are contrary to public policy.

An agreement to supply funds to carry on a suit in consideration of having a share in the property, if recovered, is not necessarily opposed to public policy, since cases may easily be supposed in which it would be in furtherance of right and justice, that a suitor who had a just title to property, and no means to support it, should be assisted in this way. But agreements purporting to be made to meet such cases, when found to be extortionate and unconscionable, so as to be inequitable, or to be entered into for improper objects, as for the purpose of gambling in litigation, or of injuring others by encouraging unrighteous suits, are contrary to public policy, and ought not to have effect given to them.

Since by the law of India a champertous agreement does not constitute a punishable offence, an action in that country, founded on alleged champerty, to recover losses and costs incurred in litigation, cannot be sustained on the ground that a remedy by action accrues where an indictable offence has been committed.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it has been done maliciously and without reasonable or probable cause. In the absence of such proof, an action for losses and costs incurred in defending a suit will not lie as against a person who is alleged to have been a mover in that suit, and to have had an interest in it, but who had not been made a party to the record; since such a state of things creates no legal privity from which a promise can be implied on which an action on contract can be founded, nor does it, *ex hypothesi*, constitute a legal wrong.

* *Present:*—SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

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Where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given.

The rejection by the Court of an application under Act VIII of 1859, s. 73, to have a stranger, who has an interest in the suit, made a co-plaintiff on the record, cannot give a ground for an action against such stranger for costs incurred in the suit, which would not otherwise lie.

The cases in which persons other than parties to the suit have been held liable to costs in England, relate to applications either in the cause itself, or to the disciplinary and summary jurisdiction of the Courts. They give no support to the contention that an independent action will, under such circumstances, lie.

THIS was an appeal from a judgment and decree of the High Court of Judicature at Fort William in Bengal, in its Appellate Jurisdiction, dated the 28th May, 1874, reversing a decree of the said Court, in its Ordinary Original Civil Jurisdiction, dated the 30th March, 1874, and dismissing a suit instituted by Ram Coomar Coondoo and Kali Coomar Coondoo, as plaintiffs, against Chunder Canto Mookerjee as defendant (1).

By this suit the Coondoos sought to recover from the defendant, as damages, the costs and expenses which they had incurred in defending certain suits brought against them by one McQueen and his wife, on the ground that the litigation had been instigated and maintained by Mookerjee for his own benefit, and at his own expense, and without reasonable or probable cause.

The facts of the case are as follows:—

McQueen, in right of his wife, claimed to be entitled to certain lands and premises in Howrah, of which the Coondoos were in possession. Neither he nor his wife having the means wherewith to defray the expenses of litigation, they, on the 17th July, 1867, entered into a written agreement with Chunder Canto Mookerjee. This agreement recites the title of the McQueens to the property in question; their having no funds to enable them to take legal proceedings for its recovery; their having applied to Mookerjee for assistance, and his having agreed to assist them. They then appoint Mookerjee to be

(1) See 13 B. L. R., 530.

their attorney, agent, and mooktear to institute and prosecute the necessary proceedings for the recovery of their property; while he, on his part, covenants to conduct the litigation and to provide the necessary funds, and also, during the pendency of the proceedings, to make a monthly allowance of Rs. 150 to the McQueens for their support, it being agreed that he should repay himself all advances with interest at twelve per cent. out of the property when recovered, and also retain for himself, in consideration of his trouble and risk, "one equal third share of and in the clear net profits" of the litigation. The McQueens, on the other hand, covenant not to interfere with Mookerjee in the prosecution of the suits which he may think it necessary to institute, but to render him all the assistance they can, and they declare that the power of attorney granted to him shall be irrevocable so long as he continues to conduct, and provide funds for carrying on, the legal proceedings and to pay the said monthly allowance. It was, however, provided that if McQueen gave his whole time and attention to the conduct of the litigation he might do so, but under the control of Mookerjee; and that the McQueens might revoke the power of attorney on repayment to Mookerjee of all his advances with interest at 12 per cent., and a further sum of Rs. 2,000 by way of liquidated damages; and further that, if Mookerjee should, at any time, fail to make the necessary advances, or to pay the stipulated monthly allowance, the agreement should be void, and Mookerjee should no longer be entitled to recover any money which he might have advanced or paid. Power was likewise reserved to the McQueens to compromise if the sum offered should cover the entire sum due to Mookerjee in respect of payments made by him with interest thereon, but not otherwise, unless with his consent.

In pursuance of this agreement, in August, 1867, a suit was commenced in the name of the McQueens against the Coondoos, in the Court of the Principal Sudder Ameen of Hooghly, for the recovery of the said lands, which suit was afterwards transferred to the Court of the Zillah Judge. While the suit was pending in the Zillah Court, the Coondoos having come to know of the agreement of the 17th July, applied to the Judge, under s. 73,

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Act VIII of 1859, to have Mookerjee made a party to the suit, which, however, the Judge refused to do, on the ground that the agreement gave him no present interest. In April, 1868, the suit was heard in the Hooghly Court, and dismissed with costs. The McQueens appealed to the High Court, and the Coondoos filed a cross appeal, setting forth, among other objections to the proceedings in the Judge's Court, that he had not made Mookerjee a party to the suit. On the 15th April, 1869, the High Court reversed the decree of the Judge of Hooghly, and gave judgment in favour of the McQueens. No reference was made in the judgment of the High Court to the question as to whether Mookerjee ought to have been made a party to the suit, and the point does not seem to have been insisted on when the case was argued before the High Court.

On the 11th May, 1869, the Coondoos petitioned for leave to appeal to Her Majesty in Council. Concealing the fact of this petition having been filed, Mookerjee applied for and obtained an order for execution from the Hooghly Court, under which the McQueens were put in possession of the property in litigation. These proceedings having been brought to the notice of the High Court, it was ordered that the Coondoos should be restored to possession, unless the McQueens gave security for costs in the event of the decree of the High Court being reversed on appeal, and for the rents which might be received by them during the pendency of the appeal. Thereupon, a security bond for a sum of Rs.12,000 was given by Mookerjee. The McQueens, accordingly, remained in possession, and they recovered from the Coondoos, by attachment of other property, a sum of Rs. 4,739, being the costs incurred in the Hooghly Court and in the High Court.

On the 3rd September, 1870, a second suit was instituted in the name of the McQueens to recover from the Coondoos mesne profits in respect of the disputed premises. On the 21st of the same month, the McQueens sold to Mookerjee absolutely all their interest in the pending suit and appeal for a sum of Rs. 22,000, out of which Rs. 12,500 was to be deducted for payments already made to them. In March, 1872, the Judge of the Hooghly Court gave a decree for Rs. 5,094, in the suit for mesne profits.

On the 25th June, 1872, the decree of the High Court, of the 15th April, 1869, was reversed by the Privy Council, with costs in the Courts below, and the costs of the appeal; and, subsequently, the judgment in the suit for mesne profits was set aside on review, and the suit dismissed with costs.

On the 14th September, 1872, the Coondoos were restored to possession of the premises in Howrah, but failing to find any property of the McQueens against which to execute their decree for costs, they, on the 9th June, 1873, instituted the present suit.

Their plaint sets forth in full the agreement of the 17th July, 1867, and recites the proceedings hereinbefore referred to. It then proceeds:—

"The plaintiffs charge that, by reason of the wrongful and injurious acts of the defendant hereinbefore alleged, and by reason of his entering upon and obtaining a lease of, and ultimately purchasing the aforesaid lands and premises pending the suit so maliciously instituted and maintained by him, in the names of the said John McQueen and Mary Anne, his wife, in pursuance of the unlawful and champertous agreement entered into by him with them as aforesaid, he the said defendant has made himself liable for all the costs incurred by the plaintiffs in and about the defending of the said suit, and also for all the rents, issues, and profits which the plaintiffs would have received from, or in respect of, their said property, but for the aforesaid wrongful and injurious acts of the defendant, together with interest thereon at the rate of twelve per cent. per annum; and the plaintiffs submit that in case this Honorable Court should not see fit to award to the plaintiffs as damages a sum equal to the whole of the rents, issues, and profits of which they have lost, or been deprived of by the wrongful and injurious acts of the defendant, then they are, at least, entitled to recover so much of the said rents, issues, and profits as came into the hands of the defendant, or which, but for his wilful act or default, might have come; and the plaintiffs further submit that, from and after the date of the said defendant's contract with the said John McQueen and his said wife, for the absolute sale to him of the said premises, the said defendant ought, if liable for no other costs, to be held liable for such costs and for the rents, issues, and profits secured by him thereafter.

"The said litigation was instigated and carried on and conducted by the defendant at his own expense, and with a view to his own benefit, and the defendant was the real mover in the said proceedings, and

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unlawfully and maliciously used the procedure and process of the Courts to the damage and injury of the plaintiffs.

"The plaintiffs' cause of action was a continuous one, and arose on the termination of the litigation hereinbefore described."

The defendant, in his written statement, admitted the execution of the agreement, and that he had supplied funds in accordance with its terms, and that he had given a bond as security for the costs in the appeal to the Privy Council; but he contended that he had acted in good faith, and that the plaintiffs should be called on to elect either to enforce the bond which he had given or to abandon it. He also contended that the plaintiffs having submitted to the rejection, by the Judge of Hooghly, of their application to have been made a party to the original suit, were estopped from bringing this action. He denied that the plaint disclosed any cause of action, or that he was liable in respect of the wrongs therein alleged, and he pleaded that the claim was barred by limitation.

The cause was heard by Mr. Justice Macpherson, who, on the 30th March, 1874, gave judgment in favor of the plaintiffs (1).

From this decision the defendant appealed, and on the 28th May, 1874, the Chief Justice, Sir Richard Couch, sitting with Mr. Justice Pontifex as an Appellate Court, reversed the decision of the Court below, and the plaintiffs appealed to Her Majesty in Council.

Mr. *Leith*, Q.C., and Mr. *Doyne* for the appellants.—We do not contend in opposition to the finding of the Courts below that the original suit against us was instituted or prosecuted without reasonable or probable cause. We say that the agreement entered into by the McQueens and the present respondent was champertous. The Appeal Court has held that champerty not being in India an indictable offence, does not afford ground for an action. That is an erroneous view. Champerty is a wrong, and is, therefore, a ground of action to one who has suffered damage thereby. It is immaterial that the wrong is not a criminal offence. The cases of *Fischer* v.

(1) 13 B. L. R., 532.

Kamala Naicher (1), *Grose* v. *Amirtamayi Dasi* (2), *Mulla Jaffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (3), and *Tara Soonduree Chowdhrain* v. *The Collector of Mymensingh* (4) show that speculative bargains for the purchase of interests under litigation are void as being immoral and opposed to public policy. Immoral agreements of this character carried out to the injury of third persons, give such persons a right of action: see *Pechell* v. *Watson* (5), *Hilton* v. *Woods* (6), and *In re Jones* (7). Apart from the liability in respect of wrong, it is equitable that we should be repaid the expenses which we have incurred through the respondent having promoted the suit against us. The McQueens had denuded themselves of all real interest in the property and in the suit in his favour. As assignee of their interests, he should have come forward and had himself substituted as plaintiff on the record. In *Bama Soonduree Dossee* v. *Annundo Lal Dass* (8), it had been held by the High Court that those interested in, and who maintain, suits may be compelled to recoup defendants their costs. [SIR M. SMITH.—But the Chief Justice says, there is no room for equity here. You should have had the respondent made a party to the suit, or you should have applied in the suit to have security. The respondent's liability should have been insisted on in the other suit, not in this.] The appellants did apply in the original suit to the Civil Judge to have the respondent made a co-plaintiff, but the application was refused. We appealed in respect of that refusal, but the point did not receive the attention of the Appellate Court. Indeed, it seems doubtful whether, under the provisions of s. 73, Act VIII of 1859, the respondent could have been forced to become a party to the suit. The section allows persons who think their rights affected to put themselves before the Court, but does not seem to apply to proceedings *in invitum* to bring a person against his will upon the record, so as to make him answerable for costs.

(1) 8 Moore's I. A., 170.
(2) 4 B. L. R., O. C., 1.
(3) 7 Mad. H. C. Rep., 128.
(4) 13 B. L. R., 495; S. C., 20 W. R., 446.
(5) 8 M. & W., 691.
(6) L. R., 4 Eq, 432.
(7) L. R., 6 Ch., 497.
(8) Bourke's Rep., O. C., 44; Appeals from O. C., 96.

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The decisions on the construction of the section have not been uniform. See *Joygobind Dass* v. *Goureeproshad Shaha* (1), *Saroda Pershad Mitter* v. *Kylash Chunder Banerjee* (2), *Kalee Pershad Singh* v. *Joynarain Roy* (3), *Ridnath Sahoy* v. *Gopee Sahoo* (4). In this last case, Markby, J., observed, that the action of the Court under s. 73 was a matter of discretion, and, therefore, not a matter of appeal. If that was a correct view, the order of the Judge refusing to make the respondent a party to the record was final. In *Judooputtee Chatterjee* v. *Chunder Kant Bhuttacharjee* (5), it was expressly held that a Court was not competent to order the name of the purchaser of the rights of a plaintiff in a suit to be substituted for that of the plaintiff. [SIR M. SMITH.—Would not there be a general equity either to put him on the record, or to restrain proceedings until security was given?] The last section of the Civil Procedure Code declares that the procedure of the Civil Courts is to be regulated by that Act, and by no other law. If we had no power to bring the respondent before the Court under s. 73, there could be no other authority for doing so. [SIR M. SMITH.—If there was a right otherwise, s. 73 would not take it away. SIR R. COLLIER.—If the bargain was champertous, and the respondent took nothing under it, he would not be entitled to be made a plaintiff.] In an action in ejectment the Courts in England may order a person not a party to the record to pay costs—*Evans* v. *Rees* (6). [SIR R. COLLIER.—That case applies to actions in ejectment only, and has reference to the fictitious nature of the proceedings. In *Hayward* v. *Giffard* (7), it is laid down as a general rule by Lord Abinger that Courts of Justice have no power except over parties to the record.]

Mr. *Cowie*, Q.C., and Mr. *F. H. Bowring* for the respondent.—It has been held by both Courts below that the litigation in which the appellants had incurred the costs which they claim

(1) 7 W. R., 202.
(2) 7 W. R., 315.
(3) 11 W. R., 361.
(4) 14 W. R., 90.
(5) 9 W. R., 309.
(6) 2 Q. B., 334.
(7) 4 M. & W., 194.

in this action, had not been instituted or prosecuted without reasonable or probable cause. Under such circumstances an action would not lie for improperly putting the law in motion. To succeed in the present action the appellants had, therefore, to make out one of two propositions: *First*, that there was a champertous agreement constituting an offence under the law applicable in India, resulting in special damage to the appellants, and so giving them a right of action; or *second*, that the interest of the present respondent in the original suit was that of a real plaintiff, and that he could not be brought on the record, or otherwise reached, under the provisions of the Civil Procedure Code.

Taking the second proposition first, we are to see whether the respondent had an interest when the McQueens first instituted their suit. If he had, then the case founded on maintenance is at an end. [SIR M. SMITH—Not if the consideration for that interest was champertous. The effect of the agreement is the real point.] If his interest was champertous, could he be made a party to the suit? According to the true construction of the agreement the respondent had assigned to him an interest of the nature of a mortgage of two-thirds of the property claimed by the McQueens, with the object that he should carry on the suit. There was, therefore, a partial assignment before suit brought, which was not disclosed by the assignors at the time the suit was brought, but which, while the cause was pending, came to the knowledge of the defendants. With that knowledge the defendants were in a position to take such steps as might secure them from loss. They applied to the Judge under s. 73 of the Procedure Code that the respondent might be made a party to the suit. The Judge refused on the ground that the respondent had no interest. In this we think he was wrong, for we construe the agreement as a partial assignment. Against the Judge's decision on this point the defendants brought a cross-appeal to the High Court, but they did not prosecute that cross-appeal. At the hearing in the High Court, there was a re-settlement of issues, the parties suggesting the issues which they desired to be tried, but no mention was made of adding the respondent as a party. That matter was allowed to drop,

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and the High Court, in its judgment, did not refer to it. It has been contended for the appellants that if the appeal on this point had been insisted on, the High Court could not have interfered with the discretion exercised by the Civil Judge, and that the Courts in India are so tied up by the Procedure Code that they cannot add a party unless he comes forward voluntarily as an intervenor. The cases cited do not bear out that contention, and apart from legislation, every Court has a discretion to say whether or not the real parties are before it, and any order made in exercise of that discretion would be subject to appeal, since it affects the merits of the suit.

As to the alternative proposition, there was no authority either in England or in India for holding that an action would lie against a man merely on the ground that he was the real owner and substantially the plaintiff in an unsuccessful suit in which the defendant has been put to cost and expense. The existence of champerty and maintenance is not sufficient to support such an action, the ground of which must be the malicious abuse of civil process without probable cause. The element of champerty in such a suit is immaterial. Looking at the English Statutes on the subject, it might be doubted whether such an agreement as was made the ground of the present suit was contemplated by these enactments.

The Statutes 3 Ed. I., c. 25 and 28 (1), 13 Ed. I., c. 49 (2), 28 Ed. I., c. 11 (3) were only declaratory of the common law which had been neglected or abused. The Statute 33 Ed. I. (4) puts the action for champerty or maintenance on the ground of malice. The offence is maliciously to maintain or to bargain for part of the subject of a suit. So likewise the Statutes 20 Ed. III., c. 4 (5) and 32 Henry VIII., c. 9 (6) imply something *malum in se*, a transaction corrupt or illegal. See the observations in Co. Litt., 368b and 369a; Hargrave's Note on Co. Litt., 161a; Comyn's Dig. Tit. Maintenance, A. 5, citing Second Inst., 208; Hawkin's Pleas of the Crown, 8th ed, Vol. I.,

(1) Revised Edition of Statutes, Vol. I, 22.
(2) *Id.*, 72.
(3) *Id.*, 105.
(4) Revised Edition of Statutes, Vol. I, 111.
(5) *Id.*, 172.
(6) *Id.*, 481.

pp. 454—463; and see the Year Book, 11 Henry VI., folio 11. There is not a case in the books since 11 Henry VI., to show that an action will lie in respect of the abuse of civil process in the absence of these elements, which must be averred in the ordinary action for malicious prosecution, see *Cotterell* v. *Jones* (1). In the case of *Pechell* v. *Watson* (2), which has been referred to as a contrary authority, there were two counts, one of which charged the advising to commence an action without reasonable and probable cause, and the other of which charged that the defendants contriving, &c., wrongfully, unjustly, maliciously, and unlawfully upheld and maintained the said action. In *Flight* v. *Leman* (3) the plaintiff failed through not having averred want of reasonable or probable cause. The cases of *Savile* v. *Roberts* (4), *Gregory* v. *The Duke of Brunswick* (5), and *Findon* v. *Parker* (6) show that malice must be established. As to the manner in which Courts of Equity in England deal with the subject of maintenance, see *Knight* v. *Bowyer* (7). [SIR B. PEACOCK cited *Wood* v. *Griffith* (8).] English law does not apply to the mofussil, and because the parties to the present suit are subject to the original jurisdiction of the High Court, it does not follow that the English law as to champerty and maintenance could be applied in respect of an agreement relating to lands in the mofussil, and to proceedings arising in a mofussil Court. It might further be doubted whether the English Statute and Common Law with regard to maintenance form part of the law to be administered by the Charter Courts in Presidency Towns. Were they part of the law introduced by the Charter of 13 Geo. I? The test was their applicability to the circumstances of the people—*Mayor of Lyons* v. *The East India Company* (9). This was a case between Hindus, and to be governed by Hindu law. *Grose* v. *Amirtomayi Dasi* (10), *Pitchakutti Chetty* v. *Kamala Nayakkan* (11),

(1) 11 C. B., 713.
(2) 8 M. & W., 691.
(3) 4 Q. B., N.S., 883.
(4) 1 Ld. Raym., 374; S. C., 1 Salk., 13.
(5) 6 M. & G., 205.
(6) 11 M. & W., 675.
(7) 2 DeG. & J., 421, at p. 444.
(8) 1 Swans., 43, at p. 56.
(9) 1 Moore's I. A., 175.
(10) 4 B. L. R., O. C. 1.
(11) 1 Mad. H. C. Rep., 153.

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Ramrav Khanderav v. *Govind Pandshet* (1), *Damodhar Madhavji* v. *Kahandas Narandas* (2) show that the English law of champerty and maintenance are not in force in India. Where Courts in England have held persons not parties to the record to be liable for costs, as in *Dungey* v. *Angove* (3), *Cockle* v. *Whiting* (4), *In re Jones* (5), and *Hilton* v. *Woods* (6), the liability has been declared, on summary proceedings taken, in the suit in which the costs were incurred, and not in a separate action. In these cases the Courts exercised a disciplinary jurisdiction to punish irregularity on the part of solicitors and contempt. The interference in the case of *Bama Soonduree Dossee* v. *Anundo Lal Dss* (7) was put by Peacock, C. J. on the latter ground.

Mr. *Leith*, Q.C., in reply.—The English Statutes on the subject of champerty and maintenance are to be applied by the High Court in its original jurisdiction if they formed part of the law introduced into India by the Charter of 13 Geo. I. There was nothing in the condition or circumstances of the people of India to exclude them, since they were based on general principles of universal application. Apart from the Statutes an action would lie at Common Law on the ground that a champertous agreement is contrary to public policy. This principle has been recognized by the Courts of Equity in England—*Harrington* v. *Long* (8). To support the action it is not necessary to give proof of special malice. It is enough to show that the defendant has wrongfully made himself party to a suit, the necessary result of which is to put the plaintiff to expense.

The following cases were cited as showing that the English law as to champerty and maintenance was recognized and followed by the Indian Courts. *Mulla Jaffarji Tyeb Ali Saib* v. *Yacali Kadar Bi* (9), *Ramgholam Singh* v. *Keerut Singh* (10), *Brijnarain Singh* v. *Tekhnarain Singh* (11),

(1) 6 Bom. H. C. Rep., A. C., 63.
(2) 8 Bom. H. C. Rep. O. C. 1.
(3) 2 Ves. Jr., 304, at p. 313.
(4) 1 Russ. & My., 43.
(5) L. R., 6 Chap., 497.
(6) L. R., 4 Eq., 432.
(7) Bourke's Rep., O. C., 44; and Appeals from O. C., 96.
(8) 2 My. & K., 590.
(9) 7 Mad. H. C. Rep., 129.
(10) 4 Sel. Rep., 12.
(11) 6 Sel. Rep., 131.

Zuhooroonnissa Khanum v. *Raseeh Lal Mitter* (1), *Syud Keramut Ali* v. *Sumbhoonath Mitter* (2), *Maharajah Muhessur Buksh Singh* v. *The Government* (3), *Andrews* v. *Maharajah Sreesh Chunder Raee* (4), *Kishen Lal Bhoomik* v. *Pearee Soondree* (5), *Panchcowree Mahtoon* v. *Kaleechurn* (6), *Shaikh Abed Hossein* v. *Lalla Ram Sarun* (7), *Grose* v. *Amirtomayi Dasi* (8), *Juggessur Coomar* v. *Prosonno Coomar Ghose* (9).

Even if the rest of the plaintiffs' claim were to be disallowed, they were at all events entitled to the expenses incurred in the appeal to the Privy Council subsequent to the purchase by the respondent of the whole rights and interest of the McQueens in the subject of litigation. After that time he was the real appellant, and must be held answerable.

Their Lordships took time to consider their judgment, which was delivered as follows by

SIR M. E. SMITH.—This suit was instituted by the appellants, who were the successful defendants in two former suits brought by one McQueen and his wife against them, to recover from the defendant, Chunder Canto Mookerjee, who was neither an original nor added party in those suits, the amount of the costs incurred by them in that litigation, and which McQueen and his wife, by reason of their poverty, were unable to pay.

The principal suit of the McQueens (the other being for mesne profits only) was brought in the Hooghly Court to recover from the present plaintiffs some lands in Howrah, which their father had purchased of one Bebee Bunnoo. Mrs. McQueen was the illegitimate daughter of one McDonald and Bebee Bunnoo, and she claimed the property as her father's, and as being entitled to it, after her mother's death, under his will. The defence of the now plaintiffs in that suit

(1) 6 Sel. Rep., 298.
(2) S. D. A., 1847, p. 423.
(3) S. D. A., 1848, p. 659.
(4) S. D. A., 1849, p. 340.
(5) S. D. A., 1852, p. 394.
(6) 9 W. R., 490.
(7) 13 W. R., 426.
(8) 4 B. L. R., O. C., 1.
(9) 1 Ind. Jur., N. S., 282.

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was that Bebee Bunnoo was either the real owner, or had been allowed by McDonald to deal with the property as owner, and that their father was a purchaser from her without notice of any other title. It appears that they and their father had held possession of the property for 24 years after the purchase, and had greatly improved it.

The Zillah Judge held the suit to be barred by limitation, and dismissed it. The High Court (finding that Bebee Bunnoo had died within twelve years of the suit) reversed his judgment, and having retained the case, and tried it on the merits, passed a decree in favour of the then plaintiffs, the McQueens.

On an appeal to Her Majesty, the decree of the High Court was reversed, and it was ordered that the suits should be dismissed, and that the then defendants (the now plaintiffs) should have their costs in India and of their appeal to Her Majesty. These costs amounted to a large sum, and the McQueens were unable to pay them.

The connection of the defendant Mookerjee with the above litigation, and the facts relied on to support the present action, will now be referred to. A special agreement was entered into between the McQueens and Mookerjee, which recited an apparently good title of the former to the property. By this agreement Mookerjee was appointed the attorney and mooktear of the McQueens to conduct the litigation against the present plaintiffs. On the one side he undertook to manage the suit, to make all necessary advances for the purpose, and further to make an allowance of 150 rupees per mensem to the McQueens, for their support during the pendency of the proceedings. On the other side they agreed in effect that Mookerjee should have the management of the suit, they, however, assisting him, unless it happened that McQueen could give his whole attention to the litigation, in which case he was to have the conduct of it, "but under the control of Mookerjee." It was stipulated that all the advances should be repaid with interest at 12 per cent., and that, as remuneration for his trouble and risk, Mookerjee should have a third part of "the clear net profits" of the suit; and, by way of security, it was agreed that he should receive all moneys,

and take possession of all lands recovered, and after satisfying his own claims pay over the balance to the McQueens.

This power of attorney was made irrevocable, unless upon the terms that the McQueens should repay all the moneys advanced with interest at 12 per cent., and a further sum of 2,000 rupees as liquidated damages. McQueen certainly did not give his whole attention to the suits; and (although he occasionally saw the pleaders) they were really managed by Mookerjee.

It appears that after the present plaintiffs had obtained leave to appeal from the judgment of the High Court in the original suit, the McQueens obtained possession of the property. The Court having ordered the possession to be restored, unless the McQueens gave security to the amount of 12,000 rupees to repay what would be due in case the decree should be reversed, the present defendant gave a bond to the above amount as such security.

Pending the appeal to Her Majesty, Mookerjee purchased of the McQueens all their interest in the principal suit, and the suit for mesne profits, for 22,000 rupees, out of which he was to deduct 12,500 rupees for the advances he had made to them, and from this time he appears to have conducted the appeal in his own interest.

It should be stated that, in the former suit, the now plaintiffs—upon the agreement between Mookerjee and the McQueens coming to their knowledge—applied to the Judge to have Mookerjee made a party to the suit under the 73rd section of Act VIII of 1859, in order that, if successful, they might make him responsible for costs. The Judge refused the application. Upon the appeal to the High Court by the McQueens, the present plaintiffs raised this point in their memorandum of cross-appeal, but no notice appears to have been taken of it in the judgment of that Court.

The plaint in the present action alleges that the plaintiffs being in lawful possession as owners of the property in question, the defendant, knowing this was so, maliciously conspired with the McQueens to bring a suit in their names to take the possession from them, and in furtherance of this conspiracy entered

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into the agreement already described, which is set out at length. It then alleges that the agreement contains false and fraudulent recitals of a pretended title in the McQueens, and that it "savours of champerty and maintenance, and is otherwise wholly illegal and contrary to public policy," and was entered into "for the purpose of barratrously maintaining an unjust and oppressive suit against the plaintiffs" in the names of persons who had no right and were without means to pay the costs. It then avers that the former suit was brought "maliciously and without reasonable and probable cause," and after describing the proceedings in the suit, and the facts showing the defendant's connection with them, alleges that "the litigation was instigated and carried on by the defendant at his own expense, and with a view to his own benefit, and that he was the real mover, and unlawfully used the procedure of the Court for his own benefit."

If all these allegations in the plaint, or so many of them as aver that the suit was brought or instigated by the defendant, maliciously and without probable cause, had been proved, this action would, undoubtedly, have been sustained, upon the principle that that the prosecution of legal proceedings which are instigated by malice, and are at the same time groundless, is a wrong to the person who suffers damage in consequence of them.

This principle is thus stated by Mr. Justice Williams in *Cotterell* v. *Jones* (1):—

"It is clear no action will lie for improperly putting the law in motion in the name of a third person, unless it is alleged and proved that it is done maliciously and without reasonable or probable cause; but if there be malice and want of reasonable or probable cause, no doubt the action will lie, provided there be also legal damage."

In the present case, however, both the Courts below have found that neither malice nor the absence of probable cause have been proved. Their Lordships entirely agree with the Courts in India on this point, and it appears to them that the facts present a case having a wholly different aspect.

(1) 11 C. B., 713.

With regard to the motives of the defendant it is not pretended that he entertained any ill-feeling or malice in any sense towards the plaintiffs. The terms of the agreement, and his large expenditure, show that he was prompted in what he did by his having formed a favourable and sanguine opinion of the title of the McQueens, and by the hope of a profitable return for his advances. Nor can the suit be said to have been wanting in probable cause, when the two learned Judges of the High Court who heard it on appeal decided in favour of the then plaintiffs. Indeed it was properly admitted at their Lordships' bar that the case must be considered as if the allegations of malice and want of probable cause were struck out of the plaint.

These allegations being eliminated, the question is whether the action can be maintained upon either of the two grounds argued at the bar, which, stating them generally, are:—

1. That the agreement and acts of the defendant amounted to champerty, or were otherwise illegal as being against public policy, and that the plaintiffs have suffered special damage from them.

2. That the defendant was the real actor in the former suits, and had an interest in them, and was, therefore, responsible for the costs of them.

The question whether the law of maintenance and champerty, or any rules analogous to that law, as it exists in England, have been introduced into and form part of the law of India, has been for a long period in controversy in the Indian Courts. A beadroll of decisions from 1825 to the present time was cited at the bar, and it certainly appears from them that the views of the Courts have not been uniform, and that great diversity of opinion has prevailed.

The earliest case referred to occurred in the year 1825. A pauper plaintiff, in his petition of appeal to the Sudder Court, disclosed the fact that he had agreed to give half the estate in litigation to a third person in consideration of advances made to prosecute the appeal. The Court, after directing a search in the records for precedents of such a transaction, and none having being found, declared that "the transaction savoured strongly of gambling," and also that the contract to

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give half of a large estate for a comparatively small advance was "by no means fair," and ordered that unless the agreement was cancelled the appeal should not be entertained.—*Ram Gholam Sing* v. *Keerut Sing* (1).

In 1836 the Sudder Court refused to enforce against a successful litigant an agreement he had made to give two annas of the estate if recovered in consideration of advances made to carry on the suit. They held first, that the estate being family property could not be thus disposed of; but they also held on the authority of the decision in 1825 that the transaction was of an illegal character as a species of gambling, and could not be sanctioned in a Court of Justice.—*Brijnerain Sing* v. *Tekhnerain Sing* (2).

In 1840 a similar agreement to that in the last case came before the Court: one Judge thought it was not proved; but the other, Mr. Tucker, held, following the two former decisions, that "the agreement was illegal, thus (as he said) establishing the point for future guidance in all similar cases."—*Zuhooroonnissa Khanum* v. *Raseek Lal Mitter* (3).

In a short note of a similar case in 1849, the Court is reported to have said: "As the precedents of the Court have held that champerty is illegal, we cannot enforce any condition (of the kind) in favour of the plaintiffs."—*Andrews* v. *Muharajah Sreesh Chunder Raee* (4).

In the next case the current of opinion underwent a marked change.

In 1852 a case was brought before a full Sudder Court, consisting of five Judges, in which the Principal Sudder Ameen had dismissed a suit because the plaintiff had obtained the funds to prosecute it by means of an agreement which he deemed to be champertous. This decision of the Principal Sudder Ameen was, in any view of the law, erroneous; but the Judges took occasion to express their opinion on the general question. Sir R. Barlow says: "There is no distinct law in our Code which lays it down to be illegal for one party to receive and another to give funds for the purpose of carrying

(1) 4 Sel. Rep., 12.
(2) 6 Sel. Rep., 131.
(3) 6 Sel. Rep., 298.
(4) S. D. A., 1849, p. 340.

on a suit on promise of certain consideration in the form of a share of the property sued for, if decreed to the plaintiffs." Mr. Welby Jackson, whilst he thought the precedents of the Court (referring to the cases already mentioned) had held champerty to be illegal, says: "But the matter having been now brought up generally for consideration before the whole Court, I have no hesitation in declaring my opinion that an arrangement of the nature of champerty is not of itself illegal or void." Again he says: "I know of no law against such an arrangement, and there is certainly no reason why it should be declared illegal. Such arrangements must stand or fall according to the peculiar nature of their conditions. They are liable to question like any others where a suit is brought to enforce or avoid them." The other three Judges construe the former precedents (with one exception) as holding only "that, as between a plaintiff and a party advancing funds to him to carry on his case, the Courts will not recognize and enforce agreements which appear to be exorbitant and to partake of the nature of gambling contracts." —*Kishen Lal Bhoomik* v. *Peuree Soondree* (1).

This case appears to have been generally regarded as a leading decision. Mr. Justice Glover so treats it in a case which came before the High Court so late as 1868, and refers to it as deciding that champerty *per se* was not illegal.—*Panchcowree Mahtoon* v. *Kalee Churn* (2). In this same case, however, Mr. Justice Macpherson said he did not feel it necessary to decide the question; and in consequence of the opinions expressed by him and other learned Judges in India in recent cases, it will be necessary to advert shortly to some of the subsequent decisions.

In *Grose* v. *Amirtamayi Dasi* (3), which was the case of a contract of a champertous character made by a Hindu widow, Mr. Justice Phear, after a full review of the English and Indian cases, expressed an opinion that the law which renders champerty and maintenance illegal in England is in force at least within the Presidency towns; and further that agreements

(1) S. D. A., 1852, p. 394. (2) 9. W. R., 490.
(3) 4 B. L. R., O. C., 1.

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of that character were against the interests of society in India, and, therefore, on grounds of public policy void. Upon an appeal to the full Court, the Chief Justice (Sir Barnes Peacock) did not adopt this ground of decision. He expressed his opinion thus: "That the deed was not binding on the reversionary heirs, if not upon the ground of champerty, upon the ground that it was an unconscionable bargain, and a speculative, if not gambling contract." Mr. Justice Macpherson agreed with Mr. Justice Phear in thinking that the agreement was void, as being against public policy.

Mr. Justice Holloway, in a case which came before the High Court of Madras, in its Original Jurisdiction, in 1870, expressed a strong opinion that the English Statute and Common Law relating to champerty and maintenance prevailed in that Court, and rendered contracts bearing that character void. He also, with some vehemence of language, denounced such contracts as being contrary to public policy. The opinion expressed by Mr. Justice Holloway on the application of the English Statute and Common Law was not necessary to the decision of the case, for the agreement sued upon was clearly extortionate, and there were other sufficient grounds for the refusal of the Court to enforce it.—*Mulla Jaffarji Tyeb Ali Saib v. Yacali Kadar Bi* (1).

This opinion of Mr. Justice Holloway seems to be directly opposed to the view expressed by Chief Justice Scotland in delivering the opinion of the High Court of Madras in a former case, *Pitchakutti Chetti* v. *Kamala Nayakkan* (2). The Chief Justice there says: "Maintenance and champerty are made offences by the Common and Statute Law of England, which in this respect has no application to the natives of this country, and in considering and deciding upon the civil contracts of natives on the ground of maintenance or champerty, we must look to the general principles as regards public policy and the administration of justice upon which the law at present rests. To this extent we think the law can properly be applied in perfect consistency with the Hindu law

(1) 7 Mad. H. C. Rep., 128. (2) 1 Mad. H. C. Rep., 153.

relating to contracts. See 1 Strange's Hindu Law, 275." The passage in Strange alluded to by the Chief Justice descants upon the similarity between English and Hindu law with regard to the invalidity of contracts which violate public policy and the interests of the community.

In a late case in the High Court of Bombay, *Damodhar Madhavji v. Kahandas Narandas* (1), Westropp, C. J., declined to express any opinion as to the extent to which the law of champerty is applicable to the Presidency towns or in the mofussil.

To return to the Bengal Presidency, it will be necessary to refer to one more decision only before coming to the judgments in the present suit. In the case of *Tara Soonduree Chowdhrain v. The Court of Wards* (2), the Court (Sir R. Couch being Chief Justice) held that the agreement it was sought to enforce was void, "as being contrary to public policy, and as therefore not giving any right to sue for the property which was professed to be passed by it." The learned Chief Justice commented upon and adopted the observations of this tribunal in the case of *Fischer v. Kamala Naicker* (3). He also referred with approval to the remarks of Mr. Justice Holloway as to the mischievous effects of such agreements in India.

It is to be observed that in none of the above cases did any question arise as to the liability of the parties who entered into the agreements to third persons.

To come to the judgments in the present suit. Mr. Justice Macpherson was of opinion upon the point now under consideration that the agreement was illegal and void as being against public policy, and he held, on the authority of the English case of *Pechell* v. *Watson* (4), that the present suit might be maintained. In the judgment of the High Court, delivered by Sir R. Couch, C. J., reversing Mr. Justice Macpherson's decree, the Chief Justice says: "It has been always admitted that the English Common Law, and the

(1) 8 Bom. H. C. Rep., O. C. J., 1.
(2) 13 B. L. R., 495; S. C., 20 W. R., 446.
(3) 8 Moore's I. A., 170.
(4) 8 M & W., 691.

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Statutes as to maintenance and champerty, are not applicable, and are considered as having no force in this country. They certainly do not apply to the mofussil, whatever question there might be how far they had been introduced within the jurisdiction of the Supreme Court. The ground upon which agreements which are champertous, or agreements for maintenance, have been held to be void in this country, is that they are contrary to public policy; or, as described by the Judicial Committee in *Fischer* v. *Kamala Naicker* (1), are considered to be immoral, and against public policy, and such as the law will not enforce here, and treat as void." And he held that, though such agreements were in a sense illegal, they did not amount to "an offence in India so as to give a right of action to a person who might sustain special damage from it, even if such an action might now be maintained against a person committing the offence of champerty in England."

It will now be convenient to refer to two cases before this Committee in which the subject has been to some extent considered. In *Fischer* v. *Kamala Naicker* (1), the Court below having held an agreement to be void for champerty, this tribunal thought the judgment to be wrong on the grounds that the point had not been raised by the pleadings, and also that the agreement was in no sense champertous, and, this being so, their Lordships observed: "It was unnecessary to decide whether under the law which the Court was administering those acts which in the English law are denominated either maintenance or champerty, and are punishable as offences, partly by the Common Law and partly by Statute, are forbidden." But in the course of the judgment they made the following observations: "The Court seem very properly to have considered that the champerty, or more properly the maintenance, into which they were enquiring was something which must have the qualities attributed to champerty or maintenance by English law; it must be something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the consti-

(1) 8 Moore's I. A., 170.

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tution of which a bad motive is in the same sense necessary. It is unnecessary now to say whether the above considerations are essential ingredients to constitute the statutable offence of champerty in England; but they have been properly regarded in India as an authoritative guide to direct the judgment of the Court in determining the binding nature of such agreements there.

In the more recent case before this tribunal, *Chedambara Chetty* v. *Renga Krishna Muthu Vira Puchaiya Naickar* (1), in which a suit to enforce an unrighteous and champertous bond was dismissed, the following observations were made:—

"With respect to the law of champerty or maintenance, it must be admitted, and indeed it is admitted in many decided cases, that the law in India is not the same as it is in England. The Statute of Champerty being part of the Statute Law of England, has of course no effect in the mofussil of India; and the Courts of India do admit the validity of many transactions of that nature, which would not be recognized or treated as valid by the Courts of England. On the other hand the cases cited show that the Indian Courts will not sanction every description of maintenance. Probably the true principle is that stated by Sir Barnes Peacock in the course of the argument, *viz.*, that administering, as they are bound to administer, justice according to the broad principles of equity and good conscience, those Courts will consider whether the transaction is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair or illegitimate transaction got up for the purpose merely of spoil, or of litigation, disturbing the peace of families, and carried on from a corrupt and improper motive."

The result of the authorities, then, appears to be that the English laws of Maintenance and Champerty are not of force as specific laws in India; and the decisions to this effect appear to their Lordships to rest on sound principles. So far as concerns the mofussil, there is no ground on which it can be contended that these laws are in force there. The question has chiefly

(1) L. R., 1 Ind. Ap., 241, see at p. 264, S. C., 13 B. L. R., 509, at p. 526.

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been whether they are in force in the Presidency towns, although the distinction between the Presidency towns and the mofussil has not been always borne in mind.

It is to be observed that the English Statutes on the subject were passed in early times, mainly to prohibit high Judicial Officers and Officers of State from oppressing the King's subjects by maintaining suits or purchasing rights in litigation. No doubt, by the Common Law also, it was an offence for these and other persons to act in this manner. Before the acquisition of India by the British Crown, these laws, so far as they may be understood to treat as a specific offence the mere purchase of a share of a property in suit in consideration of advances for carrying it on without more, had become in a great degree inapplicable to the altered state of society and of property. They were laws of a special character, directed against abuses prevalent, it may be, in England in early times, and had fallen into at least comparative desuetude Unless, therefore, they were plainly appropriate to the condition of things in the Presidency towns of India, it ought not to be held that they had been introduced there as specific laws upon the general introduction of British law The principles on which the exclusion from India of special English laws rest are explained in the well-known Judgment of the *Mayor of Lyons* v. *the East India Company* (1). It appears to their Lordships that the condition of the Presidency towns, inhabited by various races of people, and the legislative provision directing all matters of contract and dealing between party and party to be determined in the case of Mahommedans and Hindus by their own laws and usages respectively, or where only one of the parties is a Mohammedan or Hindu by the laws and usages of the defendant, furnish reasons for holding that these special laws are inapplicable to these towns. There seems to have been always, to say the least, great doubt whether they were in force there, a circumstance to be taken into consideration in determining whether they really were part of the law introduced into them.

It would be most undesirable that a difference should exist

(1) 1 Moore's I A, 175.

between the law of the towns and the mofussil on this point. Having regard to the frequent dealings between dwellers in the towns and those in the mofussil, and between native persons under different laws, it is evident that difficult questions would constantly arise as to which law should govern the case.

But whilst their Lordships hold that the specific English law of Maintenance and Champerty has not been introduced into India, it seems clear to them upon the authorities that contracts of this character ought under certain circumstances to be held to be invalid, as being against public policy. Some of the circumstances which would tend to render them so have been adverted to in the two judgments of this tribunal already cited.

Their Lordships think it may properly be inferred from the decisions above referred to, and especially those of this tribunal, that a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded as being, *per se*, opposed to public policy. Indeed, cases may be easily supposed in which it would be in furtherance of right and justice, and necessary to resist oppression, that a suitor who had a just title to property, and no means except the property itself, should be assisted in this manner.

But agreements of this kind ought to be carefully watched, and when found to be extortionate and unconscionable, so as to be inequitable against the party; or to be made, not with the *bonâ fide* object of assisting a claim believed to be just, and of obtaining a reasonable recompense therefor, but for improper objects, as for the purpose of gambling in litigation, or of injuring or oppressing others by abetting and encouraging unrighteous suits, so as to be contrary to public policy,—effect ought not to be given to them.

Such, then, being the law on this subject in India, it fails to support the present action. It may be that the contract in this case is unconscionable, and one which ought not to have been enforced against the McQueens if their suit had been successful; but assuming this to be so, the plaintiffs, in their Lordships' view, have failed to establish that an action arises to them

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therefrom against the defendant for the losses and costs of the litigation. By the law of India, as above interpreted, the agreement did not constitute a punishable offence, and the action cannot therefore, as pointed out by the Chief Justice below, be sustained on the ground that where an indictable offence has been committed, and an individual has suffered special loss, a remedy by action is given to him as the party aggrieved, nor does there appear to be any other principle upon which the action, under the circumstances of the present case, can be maintained. Whatever, therefore, may be the rights of the parties to the agreement as between themselves, their Lordships think that the High Court was right in holding that the action of the plaintiffs against a third party, founded on the alleged champerty, cannot be maintained.

There remains the question whether the action can be supported against the defendant, as being an actor in the suit, and having an interest in it. It is to be observed that a suit of this kind, in the absence of malice, and of the want of probable cause, is of first impression, no precedent for it having been found either in England or India. It may be assumed that, under the first agreement, the defendant acquired a contingent interest in the property, the subject of the suit, to the extent of one-third share, besides the security for his advances; that he agreed to supply all the funds required to carry on the litigation, and that he obtained the virtual control of the proceedings; for although, under certain circumstances McQueen was to manage the suit, and in any case to assist in the management, the supreme control was to belong to the defendant, subject to a power of revocation by the McQueens on onerous terms, which was not exercised. But this state of things created no legal privity between the plaintiffs and the defendant, from which a promise can be implied on the part of the defendant to pay the present plaintiffs the costs of the former suit, on which an action of contract can be founded: nor does it establish a legal wrong, for the former suit, as already shown, was brought without improper motives, and upon reasonable cause. It has, however, been contended that it would be only in accordance with justice and equity that he who was the principal mover of

a suit, and had an interest in it, should be made liable to the costs. It is obvious that a wide field of new litigation would be opened if, after the termination of the original suit, another independent suit might, on such general grounds, be brought against third persons. Interminable questions would arise as to the degree of meddling and assistance which would create the liability. So far as precedents exist, it is either in the original suit itself, or the exercise of the summary jurisdiction of the Courts, that any such liability has been enforced. It is ordinary practice, if the plaintiff is suing for another, to require security for costs, and to stay the proceedings until it is given. The now plaintiffs were fully aware, during the pendency of the former suit, of the arrangement between the McQueens and the defendant, but instead of applying for security for costs, they petitioned the Court to make him a co-plaintiff under the 73rd section of Act VIII. Without deciding whether this application was rightly rejected, it is enough to say that its rejection cannot give ground for an action which would not otherwise lie.

The instances in which persons other than parties to the suit have been held liable to costs in England, have been principally those of solicitors over whom the Court exercises disciplinary jurisdiction, as in the case of *Re Jones* (1). The Courts have also ordered the real parties to pay the costs in actions of ejectment, originally on the ground that that action was in form a fictitious proceeding, and having once assumed this power they have continued to exercise it in the actions substituted for that of ejectment. Again, the Courts, it has been said, would so interfere in case of any contempt or abuse of their proceedings, see *Hayward v. Giffard* (2). But all these cases relate to applications either in the cause itself, or to the summary jurisdiction of the Court.

A case in the High Court in Calcutta, *Bamasoonduree Dossee v. Anundlal Bose* (3), was much relied on by the appellant's Counsel. There in a suit brought (in the original jurisdiction) to recover possession of land by a nominal plaintiff, Mr. Justice

(1) L. R., 6 Ch. Ap., 497.
(2) 4. M. & W., 194.
(3) Bourke's Rep., O. C., 44; and Appeals from O. C, p. 96.

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Phear, on a motion, made apparently in the suit, ordered the real plaintiffs to pay the costs. His judgment is placed mainly on the ground that the jurisdiction exercised by the English Courts in actions of ejectment was introduced into the original jurisdiction of the High Court, and was applicable to analogous actions brought to recover land there. The Chief Justice (Sir Barnes Peacock) in affirming this order on appeal, supported it not only on the ground on which Mr. Justice Phear's judgment rests, but on the circumstances of the case, which showed, as he thought, that there had been "a gross abuse of the powers of the Court, and a contempt of Court."

It is obvious that there is nothing in these judgments which gives support to the contention that an independent action will under such circumstances lie.

It was lastly insisted for the plaintiffs that if the costs in India were not recoverable, the action ought to be sustained for those incurred in the Appeal to Her Majesty, subsequently to the purchase made by the defendant, pending that appeal, of all the rights of the McQueens in the property and the suit. Undoubtedly, the McQueens after this purchase became nominal appellants only, and the claim of the plaintiffs to recover these latter costs is as strong as a case of the kind can be. But even so, it is not stronger than many cases of ordinary occurrence, as, for instance, trustees suing on behalf of those beneficially interested, or the assignors of choses in action on behalf of their assignees; and in these and similar cases which have long been familiar to the Courts, whilst modes, such as requiring security for costs, have been devised for reaching the real party, no independent action for the costs against a stranger to the record has ever been sanctioned. Their Lordships therefore think that no distinction can properly be made between the costs of the appeal and the rest of the costs.

It results from what has been stated, that by English law an action cannot be maintained against a third person on the ground that he was a mover of, and had an interest in the suit, in the absence of malice and want of probable cause. Consequently, if that law governs, the second ground on which it is sought to support the present action fails. And if the law

administered in the mofussil is to be resorted to, the absence of all precedent in a case of such common occurrence affords an irresistible presumption that no such action is maintainable there. In answer to the suggestion that if no precedent exists, it should now be made, it has been already pointed out that where there is neither privity of some kind nor a wrong, the principle upon which actions are ordinarily sustained is wanting. When it is urged that the claim should be decided upon general principles of justice, equity, and good conscience, it is to be observed, in addition to the considerations already adverted to, that these principles are to be invoked only in cases "for which no specific rules may exist." Now it appears to their Lordships to result from what has been already observed, that rules may properly be considered to exist which define the character of actions of this kind and the circumstances under which alone they can be brought, and that it would be out of place to resort to these general principles in dealing with such actions. The consequences of such a resort in cases of this character would be to make the law utterly uncertain, to raise, as before observed, interminable questions as to the degree of interference which would sustain the action, and mischievously to multiply and perpetuate litigation after the termination of the original suit. Their Lordships, therefore, feel constrained to hold that in the absence of circumstances to convert the prosecution of the former suit into a wrong, the present action cannot be maintained.

It has been a misfortune to the plaintiffs that security was not obtained for the costs in the course of the former suit. Their Lordships also think the defendant was to blame in not coming forward as the real party in the former appeal. Under these circumstances, whilst they must humbly advise Her Majesty to affirm the judgment appealed from, they will make no order as to costs.

Appeal dismissed.

Agents for the appellants: Mr. *J. H. Wrentmore.*

Agents for the respondent: Messrs. *Clarke, Rawlins,* and *Clarke.*

ORIGINAL CIVIL.

Before Mr. Justice Pontifex.

1876 *Dec.* 18, 21, 1877 *Jan.* 8, & *Feb.* 21.

SOUDAMINEY DOSSEE *v.* JOGESH CHUNDER DUTT AND OTHERS.

Will—Bequest to a Class—Remoteness—Applicability of English Rules to Hindu Wills—Right of Hindu Widow to Partition.

A Hindu testator died in 1837 leaving four sons, and two grandsons by a deceased son. By his will, dated in 1837, after directing that his property should be divided into five shares, of which his four sons were to take one each, and his two grandsons the remaining one, the testator made the following devise: "On the death of any or either of my said four sons, or of the said *R.D.* and *M.D.* (his grandsons) leaving lawful male issue, such male issue shall succeed to the capital or principal of the share or respective shares of his or their deceased father, or fathers, to be paid or transferred to them respectively on attaining the full age of 21 years; but if any or either of my said four sons shall die without leaving any male issue, or if he or they shall die leaving such male issue, and the whole of such issue shall afterwards die under the age of 21 years, and without male issue, in such case the share or shares of my said sons so dying shall go to and belong to the survivors of my said sons and my said two grandsons for life, and their respective male issue absolutely after their deaths in the same manner and proportion as is hereinbefore described respecting their original shares." *U*, one of the sons, died in 1853, leaving an only son *S*, born in the lifetime of the testator, who died shortly after his father intestate, and without male issue. In a suit by the widow of *S* claiming as his heir and representative to recover the share of *U* as having descended to *S* absolutely, and to obtain partition,—*Held* that, inasmuch as *U* survived the testator, the gift to the male issue of the testator's sons was void for remoteness as including objects who might have come into existence after the testator's death, and therefore be incapable of taking. The rule that where there is a gift to a class, and some persons constituting that class cannot take in consequence of remoteness, the whole bequest must fail, as well as the principle of the English Courts in deciding questions of remoteness, that regard is to be had to possible and not to actual events, is applicable to the interpretation of the wills of Hindus.

The gift to the male issue being void, the subsequent limitations were also void. *S*, therefore, and through him the plaintiff, was entitled to a share in such part of the testator's estate as by reason of the invalidity of the gifts in his will was undisposed of.

The question whether a Hindu widow is entitled to partition is one for the discretion of the Court in each particular case. In this case, where the plaintiff

had daughters and grandsons, and the share she was entitled to through her husband was considerable, she was held entitled to a decree for partition.

SUIT for construction of the will of one Ram Mohun Dutt, for declaration of the plaintiff's right to a share in certain immoveable property, for ascertainment of such share, for partition of the said property, and for other relief.

The plaintiff was the widow and heiress of one Sreenath Dutt, great grandson of one Akur Dutt, who died in August, 1809, possessed of considerable moveable and immoveable property, and leaving four sons, Ram Mohun, Ram Narain, Ram Chunder, and Ram Gopal, and having made a will, dated 9th August, 1809, whereby, after making provision for his wife and daughters, he left the residue of his property to his sons in certain specified shares, and on his death his sons took possession of his property in the shares specified in the will, and constituted a Hindu family joint in food, worship, and estate. Ram Chunder and Ram Gopaul died unmarried and without issue and intestate, leaving their brothers their heirs and representatives, who remained in joint possession and enjoyment of the property. Ram Mohun Dutt died on the 20th May, 1837, leaving a will, dated the 8th March, 1837, the construction of which was a portion of the relief prayed in the present suit. The clauses in the will relating to the property in suit were as follows:—

"I direct that my talooks, zemindarees, houses, lands, Company's paper, bonds, and other securities, money, gold and silver ornaments, plate and all other my property and effects of every nature and kind (subject, nevertheless, to the payment of the legacies and other charges hereinafter mentioned, and subject also to the preference hereinafter given to my eldest son Doorga Churn Dutt and his male issue) shall be divided into five equal parts and shares; and I further direct that each of my four sons, Doorga Churn Dutt, Umachurn Dutt, Kally Doss Dutt, and Siboo Doss Dutt, shall hold and be possessed of one of such shares, and shall receive the interest and dividends thereof for his own use and benefit during his life, and that my two grandsons, Rajendro Dutt and Mahender Nath Dutt, sons of my deceased son Parbutty Churn Dutt, shall hold and be possessed of the other of the said five shares during their respective lives, and shall in like manner receive the interest and dividends thereof in equal shares for their own use and benefit,

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and I further direct that, on the death of any or either of my said four sons or of the said Rajendro Dutt and Mohender Nath Dutt, leaving lawful male issue, such male issue shall succeed to the capital or principal of the share or respective shares of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of 21 years. But my will is, and I declare that in such division my eldest son Doorga Churn Dutt for life, and his male issue after his death, shall have a larger share by two and-a-half pice (or five-eighths of a sixteenth) more than my other sons, and than my said two grandsons, Rajendro Dutt and Mohendro Nath Dutt, anything hereinbefore mentioned to the contrary notwithstanding. But if any or either of my said four sons shall die without leaving any male issue, or if he or they shall die leaving such male issue, and the whole of such issue shall afterwards die under the age of 21 years, and without male issue, in such case the share or shares of my said sons so dying shall (after deducting therefrom the sums of Co.'s Rs. 2,000, to be paid to each of the widow or widows, if any, and the sum of Co.'s Rs. 1,000 for the marriage of each of the daughter or daughters, if any, of my son or sons so dying) go to and belong to the survivors of my said sons and my said two grandsons Rajendro Dutt and Mohendro Nath Dutt for life, and their respective male issue absolutely after their deaths in the same manner and proportions as is hereinbefore described respecting their original shares."

Ram Mohun left four sons, Doorga Churn, Umachurn, Kally Doss, and Siboo Doss, and two grandsons by a son who predeceased him, the defendants Rajendro and Mohender Nath, since deceased. Umachurn died on 17th March, 1853, intestate, leaving an only son, Sreenath, born in the lifetime of the testator, the husband of the plaintiff. Sreenath died on the 19th March, 1853, intestate, and without male issue, leaving the plaintiff his heiress and representative, and an unmarried daughter, Katyani, who married after her father's death, and had three sons living at the time of suit. After the death of her husband the plaintiff continued to reside with, and be maintained out of the funds of the joint family, and was in joint possession with the defendants of the whole of the joint family property. The plaintiff submitted that, on the death of Umachurn, his son Sreenath became entitled to his father's share absolutely, and that she was now entitled to the interest of a Hindu widow in the share which belonged to

Sreenath. She stated that she was no longer willing that her share should remain joint, and was anxious to have a partition of the property, and a share thereof allotted to her in severalty.

The defendants, who were all the other living descendants of Ram Mohun, submitted the construction of the will and also the question whether the plaintiff was entitled to a share or only to maintenance to the decision of the Court; they also submitted that, even if she were entitled to more than maintenance, it was not in accordance with Hindu law or custom to allow the widow of the member of a family joint in food, worship, and estate to sue for a partition and account, where she has never been injured in her rights as a member of the family.

The case came on for settlement of issues.

Mr. *Kennedy*, Mr. *Evans*, and Mr. *Bonnerjee* for the plaintiff.

Mr. *J. D. Bell* and Mr. *Phillips* for the defendants other than Rajendro.

Mr. *Macrae* for the defendant Rajendro.

For the plaintiff it was contended, on the construction of the will, that, under the gift to the male issue of the testator, Sreenath took, on the death of his father Umachurn, an absolute estate in his father's share; and that the plaintiff, his widow, was entitled to that share as the heir and representative of her husband. The case of *Srimati Bramamayi Dasi* v. *Jages Chandra Dutt* (1), a decision on the construction of the same will, was referred to. It was also contended that the plaintiff, as a Hindu widow, was entitled absolutely to partition; and that such a right had been recognized in numerous unreported cases. On this point the cases of *Padmamani Dasi* v. *Jagadamba Dasi* (2), *Cossinauth Bysack* v. *Hurrosoondery Dasi* (3), *Hurry Doss Dutt* v. *Uppoornah Dasi* (4), and Macnaghten's Considerations of Hindu Law, 45, were referred to.

(1) 8 B. L. R., 400.
(2) 6 B. L. R., 134.
(3) Clarke's Rules and Orders, Add. Ca, 91.
(4) 6 Moore's I. A., 433.

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For the defendants it was agreed that Sreenath took under the original gift; but it was contended that he took subject to the limitations contained in the subsequent gift over, limitations which it was competent to the testator to make, and which were not void; and, therefore, on his death whatever share he took went not to his widow, but to the other descendants of Ram Mohun and their male issue.

The question, however, was raised by the Court during the argument for the defendants, whether the original gift was not void for remoteness, inasmuch as it was a gift to a class in which other objects besides Sreenath were included, who might be incapable of taking by reason of their coming into existence after the death of the testator; and if this were so, the subsequent gift over would be *à fortiori* void; and *Leake* v. *Robinson* (1) was referred to.

It was then contended that the principles of English law in this respect must not be applied to the construction of the will; that a gift to a class by a Hindu must be taken to have been intended by him to be operative only as to those of the class who could take consistently with the law; and that the bequest did not fail, but that Sreenath, who was born during the lifetime of the testator, took to the exclusion of others of the class coming into existence afterwards; and that if the gift over were held to fail, the property would descend in a manner quite contrary to the intention of the testator, *viz.*, to the widow of a grandson who had no male issue. The cases of *Krishnaramani Dasi* v. *Ananda Krishna Bose* (2), *Tagore* v. *Tagore* (3), and *Arumugam Mudali* v. *Ammi Ammal* (4) were referred to. As to the right of the widow to partition, it was contended that there was no authority that a Hindu widow was absolutely entitled to partition; that the passage from Macnaghten was a mere dictum; that the case of *Padmamani Dasi* v. *Jagadamba Dasi* (5) was distinguishable as being only a case of partition against a co-widow; that that case was not borne

(1) 2 Mer., 363.

(2) 4 B. L. R., O. C., 231, at p. 279, per Peacock, C. J.,

(3) 4 B. L. R., O. C., 103.

(4) 1 Mad. H. C. Rep., 400.

(5) 6 B. L. R., 134.

out by the texts of Hindu law cited in it by Phear, J.; that the estate of a Hindu widow was one to be enjoyed by her subject to the control of the male members of the family, which control would cease if she were allowed partition; and that partition would enable a Hindu widow to deal with, and affect property by alienation in a way in which she was not allowed to deal with or affect it.

For the plaintiff in reply, the Dayabhaga, Ch. III, s. 1, cl. 16 was referred to as giving an express right to partition to any of the co-heirs; and it was contended that the widow represented the estate for all purposes, and could exercise any right which could have been exercised by her husband. The cases of *Bissonauth Chunder* v. *Bamasoodery Dassee* (1), *Soorjeemony Dossee* v. *Denobundoo Mullick* (2), *Nishtarinee Dabee* v. *Ram Narain Mookerjee* (3), *Treepoorasoondery Dassee* v. *Debendra Nath Tagore* (4), and *Woomasoondery Chowdranee* v. *Judoo Nath Shaw Chowdry* (5), decided by Phear, J., on the 16th August, 1875, were referred to; and it was stated that a search among the records of the Court had resulted in numerous cases (about 60) being found in which decrees for partition had been allowed at the suit of Hindu widows.

On the construction of the will it was contended that the original gift was not void for remoteness, and that under it Sreenath took an estate in the share of his father Umachurn, which was not liable to be defeated by the subsequent gift; that the latter gift was void, and the case of *Porter* v. *Fox* (6), was referred to. It was further contended that if the first gift were held void, the plaintiff would be entitled to the share which Sreenath was entitled to in the property so undisposed of by the will.

Cur. adv. vult.

PONTIFEX, J.—The plaintiff in this case sues as widow of her deceased husband, Sreenath, for a partition of the estate formerly belonging to Ram Mohun, her husband's grandfather.

(1) 12 Moore's I. A., 41.
(2) 9 Moore's I. A., 123.
(3) 3 T. & B., 31.
(4) I. L. R., 2 Calc., 45.
(5) Unreported.
(6) 6 Sim., 485.

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Ram Mohun had executed a will dealing with this property. (The learned Judge read the clauses of the will set out, and continued.) Under this will the plaintiff claims that, on the death of Umachurn, one of the testator's sons, his only son Sreenath, who survived him, became absolutely entitled to Umachurn's share, and that she, as Sreenath's widow, is now entitled thereto.

This claim is resisted by the defendants, who are willing to admit that Sreenath became entitled under the original gift, but insist that his interest was defeasible under the gift over which I have read. It is, therefore, the interest of neither party to argue that the original gift to the male issue of the testator's sons is invalid as including objects too remote, or, in other words, objects to whom, under the law as now settled, the testator could not lawfully make a devise. But though neither party has urged this objection, it was raised by me during the argument, and I apprehend that I am bound to take it into consideration.

Taking the gift to Umachurn and his male issue by itself, it is clear, that although his son Sreenath was born in the testator's lifetime, and, therefore, would have been a valid object of the testator's bounty, yet, as Umachurn survived the testator, he might possibly have had other male issue besides Sreenath, who would fall within the meaning of the testator's words "such male issue shall succeed."

Now in deciding questions of remoteness it is an invariable principle of the English Courts to pay regard to possible and not to actual events; and the fact that a gift *might* include objects too remote or incapable of profiting directly by the testator's bounty is held to be fatal to its validity. The question is, however, to be considered according to the state of circumstances at the period of the testator's death, and not merely according to the state of circumstances at the date of the will.

I don't for one moment pretend that this rule, merely because it is a rule of the English Courts, should, if unreasonable, or inconvenient, be extended to the interpretation of the wills of Hindus. But it is to be noticed that the rule is not a rule of the strict English Common Law, because questions of remoteness applying to executory limitations as distinguished from contin-

gent remainders only arose for consideration after the Restoration, when executory limitations, originally devised it is said by Bridgman, were first admitted and upheld by the Courts, although an infringement on the rules of the Common Law. The rule was, in fact, established as founded on reason and convenience.

Now, in this particular case, if Umachurn had predeceased the testator, his son Sreenath would have been a valid object of gift, for in that case the whole class of Umachurn's male issue must have been known at the death of the testator. But, in fact, Umachurn survived the testator, and at the testator's death it was quite possible that other sons in addition to Sreenath might be born to Umachurn. If any such other sons had been born, they certainly would not have been capable of taking under the testator's will. And in that case it seems to me that it would not have accorded with the testator's intentions that Sreenath should take the whole of Umachurn's share to the exclusion of his brothers. The question of the testator's intention in such a case as this was well considered by Sir William Grant, in *Leake* and *Robinson* (1), and of course the question of intention is the same whether a testator be English or Hindu.

If then the rule to which I have referred did not apply to the construction of Hindu wills, there would have been an uncertainty from the period of the testator's decease until the death of Umachurn as to whether there was or was not an intestacy with respect to Umachurn's share. For if Umachurn had other sons, then as the testator could not have intended Sreenath to take the whole to the exclusion of them, there would have been an intestacy.

It seems to me that the rule is, in a special manner, applicable to and necessary for the Hindu law of devise; for I take it to be a fundamental principle of that law that the persons who are to take a testator's estate must be certain and known at the time of his death, which would not be the case if capacity to take depended on the contingency whether other persons should

(1) 2 Mer., 363, at p. 309.

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or should not come into existence. The rule that where there is a gift to a class, and some persons constituting such class cannot take in consequence of the remoteness of the gift or otherwise, the whole bequest must fail, has been held to apply to Hindu wills by the late Mr. Justice Norman in construing this particular will (see 8 B. L. R., p. 410). But it was not necessary for him in that case to decide whether the rule as to regarding possible and not actual events was also applicable. And, indeed, he extrajudicially (see p. 409) stated, that Sreenath took an absolute interest in the share which belonged to his father. With this last conclusion I am, for the reasons before stated, unable to agree. Nor do I think that the decision referred to by Mr. Bell, of Peacock, C. J., *S. M. Krishnaramani Dasi* v. *Ananda Krishna Bose* (1), applying as it does to bequests which are not similar in terms to the bequests in Ram Mohun's will, affects this question. In that case the gifts of the annuities after the decease of the first taker did not in terms comprehend a class of issue whom he should leave surviving him.

In the present case, in my opinion, the gifts to the male issue of such of the testator's sons and grandsons as survived him, must be held to be invalid and incapable of taking effect; and, therefore, I must hold that Sreenath took nothing under the devises in the testator's will. And if the devises to the male issue are void, as including objects too remote or incapable of taking a benefit under this will, all limitations ulterior or expectant on such remote or invalid devises, are also void for the reasons given in the case of *Proctor* v. *The Bishop of Bath and Wells* (2), such reasons being equally applicable to a Hindu as to an English testator, and such reasons would of course apply more strongly to a case where an object of the prior devise—as Sreenath in this case—actually came into existence.

Upon these grounds I think that Sreenath, and through him his widow, would be entitled to a share in such part of the estate of the testator as by reason of the invalidity of the gifts in his will is undisposed of.

But the plaintiff's claim is met by another objection on the part of the defendants. They insist broadly that, according to

(1) 4 B. L. R., O. C., 279. (2) 2 H. Bl., 358.

Hindu law, a widow cannot claim a partition; and they rely on what they assert to be the fact that no reported decisions exist in which such a right has been held to belong to a widow.

On the other hand, the plaintiff has submitted a list of, I think, some 40 unreported cases in this Court, in which partition has been decreed at the suit of a widow. I take it that this question is very much a question of discretion for the Court in each particular case. The Court would probably refuse partition by metes and bounds to a childless widow, who was entitled to a very small share.

But in this case the plaintiff has daughters, and the daughters have sons, and the share of Sreenath in the testator's undisposed of estate will be considerable. I think that in such a case as this a widow is entitled to a decree for partition. Otherwise she might be unable, during her life, to improve the heritage of her children.

It seems to me, therefore, that the plaintiff will be entitled to a decree for partition, and that the only issues necessary to be raised are—

1. What sons and grandsons of the testator named in his will survived him?

2. What sons and grandsons of the testator named in his will died in his lifetime leaving any and what issue living at the testator's decease?

3. What property is the subject of partition?

Attorneys for the plaintiff: Messrs. *Ghose* and *Bose*.

Attorney for the defendants: Baboo *P. C. Mookerjee*.

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Macpherson and Mr. Justice Markby.

1877 *March* 16.

IN THE MATTER OF THE PETITION OF SOORJMUKHI KOER (APPELLANT).*

Privy Council's Appeals Act (VI of 1874), s. 11.—Deposit of Costs of Appeal—Power to enlarge time.

The requirements of s. 11, Act VI of 1874, as to the deposit of costs, are not absolutely imperative. The Court has power in its discretion to modify them, and when the period for making the deposit expires on a day when the offices of the Court are closed, it is a reasonable exercise of that discretion to allow the deposit to be made on the day they re-open (1).

THE points involved in the following questions, relating to the construction of Act VI of 1874, having arisen in this and several other cases on appeal to the Privy Council, they were referred by Markby, J., for the consideration of the Court:—

1. Whether, when the last day for making the deposit under s. 11 of Act VI of 1874, falls at a time when the offices of the Court are closed, the deposit may be made on the day on which the offices re-open?

2. Whether the Court has any discretion to enlarge the time prescribed by s. 11 for making the deposit?

The reference came before the above Judges, and their opinion was delivered by

GARTH, C. J. (who, after reading the questions, continued):—We consider that we may answer both these questions by saying that the requirements of s. 11 as to the deposit of costs are not absolutely imperative. Had they been so, this Court

* Reference by the Judge in charge of the Privy Council Department, in Privy Council Appeal No. 30 of 1876.

(1) See *In the matter of Lalla Gopee Chund*, I. L. R., 2 Calc., 128, and *In the matter of Funendro Deb Roykut* v. *Jogendro Deb*, 23 W. R., 220. See also *Thakoor Kapilnath Sahai* v. *The Government*, I. L. R., 1 Calc., 142.

would not have any power to modify them. But we think they are not so. There is no provision similar to that in s. 10 requiring the petition to be dismissed in case of default. We think, therefore, that the Court has some discretion, and that it would be in all cases a reasonable exercise of that discretion, if, when the period for making the deposit expires on a day when the offices of the Court are closed, the deposit were allowed to be made on the day that the offices re-open.

APPELLATE CRIMINAL.

Before Mr. Justice Jackson and Mr. Justice McDonell.

THE EMPRESS OF INDIA *v.* JUDOONATH GANGOOLY.*

1877
Jany. 18.

Criminal Procedure Code (Act X of 1872), s. 272—Appeal—Officer appointed to prefer Appeal—Judgment of Acquittal—Conviction on Charge of Murder of Culpable Homicide not amounting to Murder—Acquittal.

On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. The Local Government, thereupon, directed the Legal Remembrancer to appeal under s. 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader. *Held*, that the appeal was duly made. *Held* further, that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of s. 272. *Held* also, that there being an acquittal on the charge of murder, the appeal lay.

THE prisoner, Judoonath Gangooly, was tried by a jury for the murder of one Dassee Raur. The jury acquitted him of the charge of murder, but convicted him of culpable homicide not amounting to murder. The Sessions Judge, although he remarked that he did not concur with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. He recorded two separate findings and sen-

* Criminal Appeal, No. 278 of 1876, against an order of J. O'Kinealy, Esq., the Sessions Judge of the 24-Pergunnahs, dated the 8th May, 1876.

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tences, stating in the first, that the jury had found the prisoner not guilty of murder and directing his discharge; and in the second, stating that the jury had found the prisoner guilty of culpable homicide not amounting to murder, and sentencing him to 10 years' rigorous imprisonment. The Local Government directed the Legal Remembrancer to prefer an appeal to the High Court under s. 272 of the Code, "against the judgment of the Sessions Judge acquitting the prisoner of the charge of murder." In pursuance of this direction, a petition of appeal was presented and filed by the Junior Government Pleader.

Mr. *Ingram* (with him the *Junior Government Pleader* Baboo *Juggadanund Mookerjee*) for the Crown.

Mr. *M. M. Ghose* for the prisoner.

Mr. *Ghose*—There are three objections to the hearing of this appeal: *First*, it has not been preferred by one of the persons mentioned in s. 272. No public prosecutor has as yet been appointed under s. 57 of the Code, and the Junior Government Pleader has not been generally appointed to prefer appeals of this nature, nor was he specially appointed to prefer this particular appeal. [Mr. *Ingram* stated that he was instructed by the Legal Remembrancer. JACKSON, J.—The appeal must be taken to be an appeal by the Government.] *Secondly*.—The prisoner has been convicted, and not acquitted. Where, upon certain facts found, the jury bring in a verdict of guilty of a particular offence, there is no such acquittal as would give a right of appeal under s. 272; that section, it is submitted, applies only to cases of absolute acquittal. *Thirdly*, s. 272 only gives a right of appeal from judgments of acquittal; it cannot, therefore, apply to cases of trial by jury in which there is no judgment; but only the summing up by the Judge, the verdict by the jury, and the sentence or order of the Court. The Code of Criminal Procedure throughout draws a distinction between a "judgment" and a "sentence" or "order." It is doubtful whether an appeal can be maintained on a question of fact. The section is a novel one, and must be construed with the utmost strictness.

Mr. *Ingram* for the Government.—The only argument to be drawn from the novelty of the section is, that, inasmuch as its wording is general, the Legislature intended to give the Local Government a general and absolute power of appeal. Under the former Code, which was drawn under the influence of English ideas of criminal justice, the verdict of a jury could only be touched under the revision section; but the present Code provides three ways of interfering with such verdict,—*viz.*, under s. 263, where the Court disagrees with the verdict, under s. 272, and under s. 288. The prisoner has been acquitted upon the charge of murder, and an appeal lies from such acquittal. Under s. 263, the jury are bound to return a verdict on all the charges on which the accused is tried; under s. 452, there must be a separate charge for every distinct offence, and each charge must be tried separately, except in the cases by the Code excepted. Then s. 457 provides for an exceptional case under that section, the accused may be convicted of the offence which he is proved to have committed, although he is charged with a "different" offence; and illustration (*b*) shows that murder and culpable homicide amounting to murder are different or distinct offences: lastly, s. 461 provides that the Court, in passing judgment, shall distinctly specify the offence of which the accused is convicted. The word "judgment" in s. 272 means what falls from the Court after the verdict; it is the conclusion of a syllogism of which the major premiss is, everyman who commits a particular offence shall be punished in such and such a way; the minor premiss,—this man has committed that offence, and the conclusion is, judgment according to the law. S. 263 shows that there is a judgment in trials by jury: "if the Court does not think it necessary to dissent from the verdict, it shall give judgment accordingly." S. 271 restricts the right of appeal of an accused person convicted in a trial by jury to matters of law, but there is no such restriction in s. 272. As to the power of appeal under the latter section in trials by jury, see the observations of Phear, J., in *Queen v. Koonjo Leth* (1).

Mr. *Ghose* in reply.

(1) 11 B. L. R., 14.

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EMPRESS OF INDIA v. JUDOONATH GANGOOLY.

The judgment of the Court was delivered by

JACKSON, J.—During the argument we disposed of the first part of the objection taken by Mr. Ghose, who has, at our request, carefully and feelingly advocated the case on behalf of the prisoner. That objection was, that we had not before us an appeal such as is contemplated by s. 272 of the Criminal Procedure Code, inasmuch as the petition of appeal had not been preferred by the Government "prosecutor or other officer, specially or generally appointed in this behalf." It appeared, and still appears to us, that, under the authority conveyed by the Secretary's letter to the Legal Remembrancer, the appeal was duly made by one of the Government pleaders, and has been regularly and properly sustained before us by the counsel instructed by, and appearing on behalf of, the Legal Remembrancer.

Mr. Ghose next contended, that in the first place s. 272 was not meant to apply, and did not apply to cases where the accused person has been tried and acquitted by the verdict of a jury; and in the next place that an appeal would not lie, inasmuch as there has not been any operative judgment of acquittal, the prisoner not having been set at liberty, but having been convicted of a minor offence arising out of the same set of facts on which he was charged with murder. We observe that one of these points, *viz.*, what is included in a judgment of acquittal, has been adverted to though not expressly decided by Phear, J. in the case of *Queen* v. *Koonjo Leth.* (1) But irrespective of that expression of opinion, we ourselves do not entertain the least doubt upon this subject. It appears abundantly from the various sections of the Code of Criminal Procedure relating to judgments, that the judgment passed by the Court of Session following the verdict of a jury which acquits is, undoubtedly, a judgment of acquittal. The Legislature has allowed an appeal in cases of acquittal by the Local Government, under s. 272, in the widest terms, and without any limitation whatever. Then as to the contention that there was no acquittal in this

(1) 11 B. L. R., 14.

case, it appears manifestly from the record that, as regards the particular charge of murder, the prisoner was acquitted, and ordered to be discharged or set at liberty; and that but for the finding of the jury and the sentence of the Court in respect of the other offence included in the charge, the prisoner would, so far as the charge of murder was concerned, have been set at liberty on his acquittal. He was charged with the offence of murder, which is an offence distinct from the offence of culpable homicide not amounting to murder. The Judge not having thought fit to refer the case under s. 263, the judgment stood as a judgment of acquittal. The Local Government is charged with the responsibility of considering in such cases, whether the public interests require that an appeal should be preferred, and as in the exercise of its judgment it has thought fit to prefer this appeal, we think the appeal lies. It remains to consider what decision we ought to arrive at upon the appeal so preferred, and I confess that I should have greatly desired that the learned Sessions Judge who tried the case in the Court below had thought right to set out in the proceedings the grounds upon which he abstained from doing that which the law enjoins him to do under s. 263, and not imposed upon the Judges of the High Court the onerous and painful duty of passing the proper sentence in the case. (The learned Judge proceeded to consider the evidence, and held that the accused was guilty of murder and sentenced him to death.)

Appeal allowed.

ORIGINAL CRIMINAL.

Before Mr. Justice White.

1877
March 19
& 22.

IN THE MATTER OF THE EMPRESS OF INDIA ON THE PROSECUTION OF MALCOLM *v.* GASPER AND OTHERS.

High Courts' Criminal Procedure Act (X of 1875), s. 147—Transfer of Case before Police Magistrate to High Court—Power to issue Mandamus.

A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants; it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.

THIS was an application under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), for a rule calling on Mr. Dickens, one of the Police Magistrates of Calcutta, to show cause why a case should not be transferred to the High Court for hearing and final determination, or for a *mandamus* to compel the Magistrate to commit.

The defendants were charged before the Magistrate, under s. 141 of the Penal Code, with being members of an unlawful assembly, and, in pursuance of the common object of such assembly, with having used criminal force, or show of criminal force, and ejected the prosecutor from the Armenian Church, of which he was in possession. The Magistrate took evidence in the case, and came to the conclusion on that evidence, that no offence had been made out. When the application was first made, the Court suggested that it had no power, under the circumstances, to grant it, and asked for an authority to show that, in a similar case, the Court of Queen's Bench or this Court would issue a *mandamus*, or grant a *certiorari*, and gave leave to renew the application.

Mr. *Phillips* (Mr. *G. Gregory* with him), renewing the application, said, that he had been unable to find any case in which the Court of Queen's Bench had issued a *mandamus* ordering the Justices to commit; but there was a reason for that remedy not being given in England, which did not exist here. The Queen's Bench does not grant a *mandamus* until all the other remedies open to the applicant have been exhausted. Now, in England, in such a case as this, the remedy would be to go before a grand jury; therefore a *mandamus* would not lie. But in this country the grand jury has been abolished, and there being no other remedy, a *mandamus* will issue, the Court having the powers, in that respect, of the Court of Queen's Bench. The Magistrate did not disbelieve the evidence, for he stopped the case for the prosecution. He considers that, admitting the facts proved to be true, they do not constitute any offence; he has, in other words, mistaken the law. Where a *primâ facie* case is made out, the Magistrate is bound to commit—Burn's Justice of the Peace, Vol. I., p. 773. He has no further discretion. [WHITE, J.—Suppose in such a case as this in England you went before a grand jury they might throw out the bill. You might, indeed, go before a second grand jury; but they also might ignore the bill: would the Queen's Bench compel the grand jury to find a true bill? And if not, the remedy you mention is very incomplete. I doubt whether the reason why the Queen's Bench won't grant a *mandamus*, is because there is a remedy by going before the grand jury.] It is submitted that it is; and that reason, the grand jury having been abolished, not existing here, this Court has power to issue a *mandamus*. In cases where there is no other remedy the Queen's Bench does grant it. In a case where there is no other remedy, a Magistrate can be ordered to grant a summons; see *The King* v. *The Justices of Kent* (1). [WHITE, J.—Here the Magistrate has exercised his jurisdiction, and dismissed the case: that seems to me to be your difficulty.] His action amounts to saying that the law does not give him power to commit, because there is no offence,—that is, he says he has no jurisdiction; in other words,

(1) 14 East, 395.

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declines jurisdiction. See 9 Geo. IV., c. 74, s. 2, as to his being bound to commit. A somewhat similar case is the refusal to issue a summons, in which case the Queen's Bench can make an order that the summons be issued; see *The Queen* v. *Adamson* (1). This is a decision on a preliminary point, not a case which the Magistrate has heard and decided. It is a matter of law as to which he has no discretion. It is similar to a case of refusal of summons, which is only a way of putting a case in train for hearing. [WHITE, J.—The Magistrate appears to me to have exercised his jurisdiction, not to have declined it. It differs from a refusal to issue a summons. He has heard the case.] He has dealt with the case in such a way as amounts to declining jurisdiction. A *primâ facie* case was made out for the issue of a summons, and the Magistrate refused to issue it. [WHITE, J.—I have no more power than the Court of Queen's Bench, and you have not shown me any case in which that Court has granted a *mandamus* in a case like this. I think it is only where there is another effective remedy that the Queen's Bench declines to issue a *mandamus.*] Even taking that to be so, it is submitted it would issue here, as there is no other effective remedy.

As to the application under s. 147, the fact that the grand jury has been abolished ought to lead the Court to put as wide a construction on the section as is possible. S. 147 differs from the old law, and is intended to have a wider scope. In 33 Geo. III., c. 52, s. 153, which was the former law, there is nothing to limit the interference of the High Court to orders for convictions. In this country appeals from acquittals are allowed, and to refuse to interfere, simply because it is a case of acquittal, would be narrowing the law to what it is in England, where appeals from acquittals are not allowed.

As to the facts of this case constituting an offence under s. 141 of the Penal Code, it is submitted they do. [WHITE, J.—On this branch of your application, one difficulty is, what am I to quash or affirm if I do interfere under the section?] The order of discharge may be quashed, and this Court may hear and determine the case itself. The order made by this Court

(1) 1 Q. B. D., 201, *per* Cockburn, C.J., at p. 205.

must be made on the merits. [WHITE, J.—Does not that show that the proceeding intended by s. 147 was some final proceeding or order of the Criminal Court?] It is submitted that it only shows that there must be some substantial matter to be adjudicated upon after the transfer.

WHITE, J.—I have, in the course of the argument, stated my views so fully that it is unnecessary to do more than recapitulate the reasons for my decision.

Mr. Phillips, on behalf of the prosecution, applies, on affidavit, for one of two orders—either for a rule under s. 147 of the High Courts' Criminal Procedure Act (X of 1875), calling on the Magistrate to show cause why these proceedings should not be transferred to this Court for hearing and final determination; or for a *mandamus* to compel the Magistrate to commit on a charge of being a member of an unlawful assembly under s. 141 of the Penal Code.

When the case came before me on the first occasion, I was informed that the Police Magistrate, having heard the evidence, did not disbelieve the facts proved, but thought that they did not amount to the offence with which the defendants were charged, and, therefore, declined to commit them for trial. When I heard that such was the nature of the case, I requested Mr. Phillips to refer me to some authority for my granting his application. He has not brought before me, however, any authority which shows that either the Court of Queen's Bench, or this Court, has ever issued a *mandamus*, or granted a *certiorari*, in a case similar to the present one. He has, indeed, referred me to two cases, *The Queen* v. *Adamson* (1) and *The King* v. *The Justices of Kent* (2), in which the Court of Queen's Bench granted a writ; in the first case, ordering the Justices to hear and determine a case which they had refused to hear; and in the second case, ordering them to issue a summons, which they had refused to issue. But both these cases, when examined, show that the Court of Queen's Bench does not issue a *mandamus* in such cases unless the inferior Court has actually declined jurisdiction, or has acted under

(1) 1 Q. B. D., 201. (2) 14 East, 395.

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IN THE MATTER OF THE EMPRESS OF INDIA ON THE PROSECUTION OF MALCOLM v. GASPER.

circumstances which amount practically to declining jurisdiction. Now in this case the Magistrate has not declined to exercise jurisdiction. He has heard the evidence in the case, and has come to the conclusion that no offence under the Penal Code has been committed. He has, in fact, exercised his jurisdiction, and decided the case in favour of the defendants. This is sufficient to dispose of the first branch of Mr. Phillips' application. Quite irrespective, however, of this, I may state that a *mandamus* could not issue in the form asked for; if it issued at all, it would go not to order the Magistrate to commit, but to order him to hear the case again, and upon a sufficient case being made out, then to commit.

As to the second branch of the application, which is to transfer the case to this Court under s. 147 of Act X of 1875, I think I am equally without power to deal with the case in the way I am asked to do. That section provides, that "whenever it appears to the High Court that the direction hereinafter mentioned will promote the ends of justice, it may direct the transfer to itself of any particular case, and shall have power to determine the case so transferred, and to quash or affirm any conviction or other proceeding which may have been had therein, but so that the same be not quashed for want of form, but on the merits only." The present case is not, I think, within the purview of the section. If I transferred it, I should be doing so not for the purpose of quashing or affirming a conviction or other proceeding, but for the purpose of hearing the case, taking the evidence of the witnesses, and myself determining whether a case for committal had been made out or not. I think the section is not wide enough to enable me to do that, and I should be extending the section beyond the intention of the Legislature if I put it in force to transfer such a case as this.

I can well imagine that the refusal of a Magistrate to commit may now and then result in a grievous failure of justice, but if the Legislature intended to provide for such a case, the Court should have been specifically armed with power to deal with such case. I cannot infer such a power in the absence of express words. I am, therefore, unable to grant this applica-

tion. I have assumed throughout these remarks that an error of law has been committed, but I have made that assumption only for the purposes of the argument. Considering the law bearing on the application to be such as I have stated, I have thought it unnecessary to hear the affidavit. The refusal to commit is not tantamount to an acquittal, and the prosecution can, if they choose, go before the Magistrate again, though I am by no means saying they ought to do so. The application must be refused (1).

Application refused.

Attorney for the applicant: Mr. *Leslie.*

APPELLATE CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Ainslie.

DEBI DUTT SAHOO (PLAINTIFF) *v.* SUBODRA BIBEE AND OTHERS (DEFENDANTS).*

1876 *June 2.*

Act XL of 1858, *s.* 18—*Act VIII of* 1859, *ss.* 2 *and* 3—*Mortgage by Administrator of a minor's property—Purchaser with notice, Title of—Duties of Purchaser.*

A mortgage of the property of a minor made by the Administrator appointed under Act XL of 1858, is invalid, unless the sanction of the Court has been previously obtained under s. 18 of the Act.

Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold under a decree so obtained to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from suit by the minor for recovery of the property.

THE plaintiff in this suit was one of four sons of one Imrit Lall Sahoo, a trader, who died in December, 1863, intestate. The plaintiff being a minor, his brother Rameswar Dutt obtained, under s. 7 of Act XL of 1858, a certificate of adminis-

* Regular Appeal, No. 65 of 1875, against a decree of W. DaCosta, Esq., Subordinate Judge of Zilla Sarun, dated the 18th of January, 1875.

(1) See *Corporation of Calcutta* v. *Bheecunram Napit, post.*

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tration of the minor's property. Rameswar Dutt was also appointed guardian of the person of the minor. After the death of Imrit Lall, his sons took possession as his heirs of all his property, and living as a joint Hindu family carried on the business formerly carried on by their father. On the 14th July, 1867 (Asar, 1274) Rameswar Dutt, for himself and the plaintiff, his minor brother, and the other two brothers, Bisseswar Dutt and Purmeswar Dutt, gave a bond for Rs. 37,000 to Subodra Bibee, payable on the 30th Pous, 1275, (February, 1868), in which bond, as a security for the above amount, they pledged Mouzah Dhubolia and a certain warehouse in Mouzah Shamsoodinpur, both which properties belonged to all the four brothers. The consideration set out in the bond was as follows: 1*st*, a sum of Rs. 2,500, due on an account current extending from 24th Asin, 1923 S. (18th October, 1866), to date of the bond; 2*nd*, of Rs. 27,500, on account of bills discounted by Subodra Bibee, the said bills having been dishonored on presentation in Calcutta; and 3*rd*, of the sum of Rs. 7,000, being a loan made by Subodra Bibee to pay certain business debts for which suits were then pending.

No question was raised as to the due execution of the bond, or the existence of the debts therein mentioned: it was admitted that no such sanction of the Civil Court as is provided for by Act XL of 1858, s. 18, was obtained.

Subodra Bibee in another suit had sued all four brothers on this bond, treating it as a mortgage bond. None of the defendants in that suit appeared, and service of summons upon them having been proved, the suit was treated as undefended, and a decree obtained on the 28th March, 1868, directing a sale of the mortgaged property. The property was, accordingly, put up for sale under the decree, and bought by Subodra herself on the 1st June, 1868, through her gomastah Gopi Lall, who was made a defendant in this suit. On the 16th November, 1870, Subodra sold the purchased property and her outstanding rights under the decree to Mr. Lewis Cosserat, who had already purchased the indigo factory in Mouzah Dhubolia from the four brothers (the plaintiff being represented by his guardian Rameswar Dutt) under a conveyance dated 9th January, 1868.

Debi Dutt having attained majority brought the present suit to recover possession of his share of the property from Mr. Cosserat, upon the ground that it was illegally mortgaged by his brother and guardian, and that, notwithstanding the proceedings and sales which subsequently took place, he had a right to regain possession of his estate.

The Subordinate Judge held, that the suit was not maintainable, on the ground that the plaintiff was, by his guardian, a party to the suit on the bond instituted by Subodra Bibee, and that ss. 2 and 3 Act VIII of 1859 barred any other remedy than a review of judgment in that suit, especially as the plaintiff did not allege that the bond was a fraudulent one.

From that decision the plaintiff appealed to the High Court.

Mr. *R. T. Allan* (with him Baboo *Moheschunder Chowdry*) for the appellant.

Mr. *Arathoon* (with him Baboo *Chunder Madhub Ghose*) for the respondents.

The arguments sufficiently appear in the judgment of the Court:—

The following cases were cited:—For the appellant, *Gireewur Singh* v. *Muddun Lall Doss* (1), *Surut Chunder Chatterjee* v. *Ashutosh Chatterjee* (2), and *Prosunno Kumari Debya* v. *Golab Chand* (3). For the respondents, *Hunooman Persaud Panday* v. *Mussamat Babooee Munraj Koonweree* (4), *Lalla Bunseedhur* v. *Koonwur Bindisseree Dutt Singh* (5), *Lekraj Roy* v. *Mahtab Chand* (6), *Looloo Singh* v. *Rajendur Laha* (7), *Alfootoonnissa* v. *Goluch Chunder Sen* (8), *Sheoraj Kower* v. *Nukchedee Lall* (9), *Sherafutoollah Chowdhry* v. *Abedoonissa Bibee* (10), *Modhoo Soodun Sing* v. *Rajah Pirthee Bullub Paul* (11), and *Prosunno Kumari Debya* v. *Golab Chand* (3).

(1) 16 W. R., 252.
(2) 24 W. R., 46; S. C. reported as *Shurrut Chunder Chatterjee* v. *Rajkissen Mookerjee*, 15 B. L. R., 350.
(3) 14 B. L. R., 450.
(4) 6 Moore's I. A., 393.
(5) 10 Moore's I. A., 454.
(6) 14 Moore's I. A., 393.
(7) 8 W. R., 364.
(8) 15 B. L. R., 353
(9) 14 W. R., 72.
(10) 17 W. R., 374.
(11) 16 W. R., 231.

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The judgment of the Court was delivered by—

GARTH, C.J. (who, after stating the facts, continued):—Without going at length, however, into the general question how far a minor is bound by a decree made against his guardian, during his minority, we think it clear that in this case the plaintiff was entitled to bring the fresh suit for the purpose of asserting his rights, and that, as against the present defendants, it was the only effectual remedy which he could pursue. If his object had merely been to reverse or alter the judgment in the former suit, it is possible that an application for a review would have answered his purpose. But the plaintiff's object was to unrip transactions which formed no part of the proceedings in the former suit, and as against Rameswar Dutt, who merely acted in that suit as the plaintiff's guardian, and as against Mr. Cosserat, who had nothing whatever to do with the former suit, it is obvious that any application for the review of the proceedings in that suit would have been utterly ineffectual, and that as against these persons the plaintiff's only remedy was the one which he has adopted. His contention and his interests in this suit are not identical with, but directly opposed to, those of Rameswar Dutt.

He says, that Rameswar, acting professedly as his guardian, has been dealing with his property in a way which the law expressly forbids, and that, in consequence of his having so dealt with it, and also in consequence of certain legal proceedings in which Rameswar has improperly acquiesced, his (the plaintiff's) share of the mortgaged property has wrongfully come into the hands of Mr. Cosserat, and his object is to release his share of the property from the position in which it has been placed by the wrongful acts of his guardian.

The first question, therefore, which we have to decide is, whether the defendant Rameswar was acting illegally when he mortgaged the plaintiff's share by the deed of July 14, 1867.

It is admitted that he was appointed guardian of the plaintiff under Act XL of 1858, and that he never obtained the sanction of the Judge to the mortgage, as by s. 18 of that Act he was bound to do.

The words of the section are: "No such person" (*i.e.*, guardian of the estate under a certificate granted under the Act) "shall

have power to sell or mortgage any immoveable property or to grant a lease thereof for any period exceeding five years without an order of the Civil Court previously obtained."

The same words are used in s. 14, Act XXXV of 1858, limiting the powers of a manager of a lunatic's estate, and it was held by Phear and Ainslie, JJ., in *The Court of Wards* v. *Kupulmun Singh* (1), that, after the passing of the Act, no manager, *de facto* or *de jure*, can have power to do that which the Act forbids.

There is a decision of Macpherson and Lawford, JJ., in *Surut Chunder Chatterjee* v. *Aushootosh Chatterjee* (2), in an appeal in which the only question was the effect of s. 18, Act XL of 1858, and it was held that a sale made by a guardian without authority from the Court was invalid, even though the purchaser had acted honestly and paid a fair price.

On the other hand, a case was relied upon by the defendants *Alfootoonnissa* v. *Goluck Chunder Sen* (3), decided by Markby and Mitter, JJ., from which it would appear that those learned Judges considered that a mortgage of a minor's property by his guardian without the consent of the Court was a mere irregularity. But we have consulted Mr. Justice Markby, who delivered the judgment in that case, and who informs us, that although the word "irregularity" might have been used, it was by no means the intention of the Court in that case to treat the conduct of the guardian in mortgaging his ward's property without leave of the Court as any other than a direct breach of the law; and we find also that, before Macpherson and Lawford, JJ. delivered judgment in the case of *Surut Chunder Chatterjee* v. *Aushootosh Chatterjee* (2), they also consulted Markby and Mitter, JJ., and that the judgment in the latter case was given with their express concurrence. The ground of the decision by Markby and Mitter, JJ., in *Alfootoonnissa* v. *Goluck Chunder Sen* (3) was, that events had subsequently transpired in that case which induced the Court to hold that the mortgage, though improper and unauthorized in the first instance, ought to stand; more especially, as in the suit

(1) 10 B L. R., 364 (2) 24 W R, 46 (3) 15 B L. R., 353..

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which was afterwards brought upon the mortgage-deed, and in which a decree was obtained, the minor himself was properly represented. Their decision, therefore, will be found not to conflict with the view which we take in the present case.

In this case we are of opinion that, in mortgaging the plaintiff's share without the sanction of the Court, the defendant Rameswar was, undoubtedly, dealing with his ward's property in a way which the law forbids, and that in not defending the suit brought upon the mortgage-bond, and allowing the property to be sold under the decree, he was improperly sacrificing his ward's interests.

Subodra Bibee, the mortgagee, took the mortgage, carried on the suit, and purchased the property with full knowledge of Rameswar's conduct; and the defendant, Mr. Cosserat, had also notice that Rameswar had been dealing with his brother's property in a way unwarranted by law, because it appears that there was an agreement dated the 5th February, 1868, made by Bisseswar, Rameswar, and Purmeswar, with Mr. Cosserat, reciting that Rameswar had been appointed guardian of his minor brother Debi Dutt, and that he, as such guardian, and for himself, together with his other two brothers, had, on 9th January, 1868, sold the Dhubolia Indigo Factory to Mr. Cosserat. The agreement then goes on to indemnify the purchaser specially in respect of any claim that might be thereafter put forward by the minor brother, Debi Dutt, and generally in respect of any other claims. This document shows that Mr. Cosserat must, at least, have understood that, in purchasing the minor's property, he was on dangerous ground, and having this knowledge, he was bound to satisfy himself that the mortgage-bond had been duly executed under the authority of the Civil Court, as required by law. He cannot say that he was a *bonâ-fide* purchaser for value without notice, for he certainly had notice that Rameswar Dutt's power of dealing with his ward's property was only such as a guardian appointed under Act XL of 1858 could exercise; and he was, therefore, bound to enquire whether the mortgage had ever been sanctioned by the Court. As a purchaser from Subodra he could take no better title

than she had, and unless the decree protected her title, it does not secure his. But she cannot be protected by the decree. She knew from the first, that Rameswar had acted in a manner unauthorized by law; she knew that the suit on the mortgage-bond had been undefended? and further, that notice of that suit had not been given to any one but to those whose interests were opposed to those of the minor. But then it was urged very strongly by the defendant's pleader, that if the debts for which the bond of the 14th July, 1867, was given, were debts due by the father, or if they were debts incurred by all the brothers in carrying on a business which they had a right to carry on for and at the risk of the plaintiff, Rameswar would have been justified in giving a simple money-bond at reasonable interest for the payment of those debts, and that, upon that bond, a decree might have been obtained by the bond-holder, and the property in question sold under that decree.

It was then argued that the instrument of the 14th July, 1867, was only a bond of this description, with a mortgage of the property in question superadded by way of further security; that the suit was founded upon the personal obligation of this bond, as well as upon the mortgage security: that, consequently, the defendant had a right to sever one portion of the instrument from the other, and to insist that there was quite sufficient cause of action to support the decree without reference to the mortgage portion of the transaction.

But assuming, for the purposes of argument, that in this instance the mortgagee could have severed one portion of the instrument from the other (which is at least doubtful), and that she could have sued upon the deed of July, 1867, as a simple money-bond, and obtained a decree in that suit, and sold the plaintiff's share of the property, the answer is, that in point of fact she has not adopted that course. She has sued upon the instrument as a mortgage-bond; she has obtained a decree upon it as a mortgage-bond; the decree is such as she could not have obtained, if she had sued merely upon the personal obligation; and it was under that decree that the property has been sold. The defendants, therefore, cannot now change the nature of that suit, or the form of the decree, for the purpose of placing

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themselves as purchasers under that decree in a different or better position; and as we find that Subodra and Mr. Cosserat were both affected with notice of Rameswar's improper conduct, we consider that the plaintiff is entitled to succeed in this suit as against all the defendants, and to recover possession of his share from Mr. Cosserat.

The appeal must, therefore, be allowed with costs, and interest as usual, payable by the respondents who have appeared; and the plaintiff must be declared entitled to recover the property in suit, with costs bearing interest at 6 per cent. per annum from date of decree of the Lower Court, payable by Rameswar Dutt Sahoo, Subodra Bibee, and Mr. Cosserat.

Appeal allowed.

ORIGINAL CRIMINAL.

Before Mr. Justice Macpherson.

1877 *April* 19 & 23.

THE CORPORATION OF CALCUTTA *v.* BHEECUNRAM NAPIT *alias* BHEECUN NAPIT.

High Courts' Criminal Procedure Act (X of 1875), s. 147—Acquittal—Presidency Magistrates' Act (IV of 1877), s. 181—The Calcutta Municipal Act (Beng, Act IV of 1876, ss. 75—79.)

The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act, were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured (1).

APPLICATION under s. 147 of the High Courts' Criminal Procedure Act (X of 1875). The facts in support of the application appeared from the affidavit of M. R. Shircore, formerly License officer to the Justice of the Peace for the Town of Calcutta, and since the passing of Beng. Act IV of 1876, License officer to the Corporation established under that Act. He stated that, under s. 78 of the Act, he had received express authority from the Corporation to assess persons exercising within the town of Calcutta any trade, profession, or calling

(1) See *Malcolm* v. *Gasper*, *ante*, p. 278.

specified in the third schedule of the Act; that, in pursuance of such authority, he assessed the defendant as the keeper of a shop for the sale of majum, an intoxicating drug, under class 3 of the third schedule to the Act for the year 1876, and on the 21st November, 1876, caused to be served on the defendant a notice, informing him that he had been so assessed, and that unless he took out a license under that class, and paid the sum of Rs. 25 therefor, he would be prosecuted without further notice; that the defendant having failed to take out a license, a summons was issued from the Court of the Honorary Magistrates for the Town of Calcutta, requiring the defendant to answer the charge of having exercised his trade without having taken out a license as provided by ss. 75 and 76, and sched. iii of Beng. Act IV of 1876, and having thereby committed an offence punishable under s. 77; and that the said summons came on for hearing on the 16th March, 1877, before Baboo Omesh Chunder Dutt, one of the Honorary Magistrates of Calcutta, who ordered the defendant to be discharged.

At the hearing it was admitted that no license had been taken out; but it was contended that as Beng. Act IV, 1876, came into force on the 1st July, 1876, and as the defendant had offered to pay Rs. 12-8, being the proportion of the license fee he considered himself liable to pay under the Act for the latter half of 1876, he was not further liable. The License officer, however, refused to accept a less sum than Rs. 25, the fee for the whole year. The Magistrate was of opinion that the defendant's liability only commenced from the 1st of July, 1876, the date of the Act coming into force, and that he should have taken out his license for the latter half of 1876; but, inasmuch as he had offered to pay the fee for that period, and as it appeared he was still willing to pay it, the Magistrate held he had incurred no penalty, and ordered his discharge.

The present application was, accordingly, made either for the transfer of the case to the High Court, or for a *mandamus* to compel the Magistrate to commit.

Mr. *J. D. Bell*, in support of the application, contended, that the decision of the Magistrate was erroneous in law, inasmuch as, under Beng. Act IV of 1876, he had no power to revise the

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assessment made by the officer authorized to assess, but was bound, on its being shown that the defendant had not taken out a license in the class under which he was assessed, to convict him under s. 77. Under Beng. Act IV of 1876, the officer of the Corporation was the proper person to make the assessment, and that assessment was final, unless an appeal was brought; here no appeal had been preferred. The cases of *Malcolm* v. *Gasper* (1) and *The Queen* v. *The Justices of Middlesex* (2) were referred to.

MACPHERSON, J.—I am of opinion that s. 147 gives me no power to grant this application. The object in fact is to appeal against an acquittal. But s. 147 does not provide for such an appeal. It contemplates the transfer of a case before disposal, or interference on behalf of persons aggrieved or injured by an order of the Magistrate. But there was no intention to give power to interfere in order to set aside an acquittal. If it had been intended to give that remedy, it would, no doubt, have been expressly given, as in the Criminal Procedure Code and in the Presidency Magistrates' Act, IV of 1877. One section of the latter Act (s. 181) really shows that s. 147 was intended to apply only where there has been a conviction, for it makes notice to the Government prosecutor necessary before an application can be made under s. 147.

Even, however, if I had the power to interfere, I would not exercise it in such a case as this.

Application refused.

Attorneys for the Corporation of Calcutta: Messrs. *Sanderson & Co.*

(1) I. L. R., 2 Calc., 278. (2) 12 L. J. M. C., 36.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

IN THE MATTER OF THE PETITION OF CHUNDER NATH SEN AND ANOTHER.*

1876 *Dec.* 11. 1877 *Feb.* 20.

Superintendence of High Court — 24 and 25 Vict., c. 104, s. 15 — Order under Criminal Procedure Code (Act X of 1872), s. 518.

The High Court cannot interfere, under s. 15 of the Charter Act, with orders duly passed by a Magistrate under s. 518 of the Criminal Procedure Code.

THE petitioners were the proprietors of an old established hât. A new hât was opened by one Hurronath Dass in close proximity to the petitioner's hât, and was held on the same days. The Assistant Magistrate, having regard to the circumstances of the case as they appeared from the evidence of witnesses taken before him, and from police reports, made an order under s. 518 of the Criminal Procedure Code, whereby the petitioners were prohibited from holding their hât on the days in question. The petitioners, thereupon, applied to the High Court to have the Assistant Magistrate's order quashed, and the case came on for hearing before Markby and Mitter, JJ. The question of the High Court's jurisdiction to entertain such an application, having regard to the provisions of s. 520 of the Code, had been referred to a Full Bench by Garth, C. J., and Birch, J., in a case which came before them; but, as upon further enquiry it was ascertained that the question then referred did not arise, it was not decided. In consequence, however, of the opinion expressed by those learned Judges that the question ought to be referred to a Full Bench, Markby and Birch, JJ. adopted that course in the present case.

Baboos *Kali Mohan Doss* and *Grija Sunker Mozoomdar* for the petitioners.

* Criminal Motion, No. 29 of 1875, against an order of Baboo K. G. Gupta, Assistant Magistrate of Backergunge, dated the 26th November, 1875.

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Baboos *Mohini Mohun Roy* and *Doorga Mohun Doss* for Hurronath Doss.

Baboo *Kali Mohun Doss.*—Although orders under s. 518 are non-judicial, and it has been decided that this Court cannot interfere with them under s. 297, and that they are not appealable, it is submitted that this Court can set them aside under s. 15 of the Charter Act. This Court has interferred in cases in which the Magistrate has not taken the initial steps which are directed to be taken under that section, and also when his order ought to have been under s. 521—*Banee Madhab Ghose* v. *Wooma Nath Roy Chowdry* (1), *Chunder Coomar Roy* v. *Omesh Chunder Mozoomdar* (2), *Sree Nath Dutt* v. *Unnoda Churn Dutt* (3). [MARKBY, J.—Those cases only amount to this. All the proceedings of a Magistrate are *primâ facie* judicial; but the Legislature has expressly provided that certain proceedings shall be considered non-judicial. If a proceeding before a Magistrate is to be brought under the latter class, it must be shown that the circumstances exist which bring it within that class. In what respect are the powers of this Court under s. 15 of the Charter Act greater than its powers under Chap. XXII of the Criminal Procedure Code?] In *Arzanoollah* v. *Nazir Mullick* (4), your Lordship, while holding that this Court could not interfere under the Criminal Procedure Code with orders made under s. 518, intimated that you might interfere with them upon an application under s. 15 of the Charter Act. [MARKBY, J.—I expressed no such opinion in that case, nor is there even the slightest indication of such an opinion.] In *Tej Ram* v. *Harsukh* (5) the Allahabad High Court held, that it could not interfere under s. 15 with an order of a subordinate Court, on the ground that it proceeded on an error of law or of fact; but this Court has gone further, and has held that it will interfere with illegal proceedings.

Pleaders for the opposing party were not called upon.

(1) 21 W. R., Cr., 26.
(2) 22 W. R., Cr., 78.
(3) 23 W. R., Cr., 34.
(4) 21 W. R., Cr., 22.
(5) I. L. R., 1 All., 101.

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The opinion of the Full Bench was delivered by

GARTH, C. J.—As the Magistrate states that riot or affray was imminent, and that he considered that the direction he gave tended to prevent, and was likely to prevent, a riot or affray, and as the facts stated by the Magistrate show that there were some grounds for the opinion which he expressed, we think that he had power, under s. 518 of the Criminal Procedure Code, to make the order complained of. This Court, therefore, cannot interfere with it under s. 15 of the Statute 24 and 25 Vict., cap. 104; nor can the Court interfere on any other ground, as by s. 520 the order made is declared not to be a judicial proceeding, however much it may infringe upon what are, or may be (irrespective of this section), the undoubted legal rights of the petitioners.

Petition dismissed.

ORIGINAL CIVIL.

Before Mr. Justice Pontifex and Mr. Justice Mitter.

KALLY PROSONNO GHOSE *v.* GOCOOL CHUNDER MITTER AND ANOTHER.

1877 *Feby.* 13 & *March* 9.

Hindu Law—Adoption—Hindu Widow with permission to adopt, Position of—Divesting of Property.

A Hindu testator died, leaving all his property to *P* and *B*, his two sons, absolutely, in equal shares. *B* died in 1845, leaving a minor son, *K*. *P* died in 1851 without male issue, leaving a widow *BD*, and a daughter. *P* also left a will, by which he gave, subject to certain trusts for the worship of the family idols, all his property to his widow *B D*, for her life, and on her death to his daughter's son (if any): the daughter died without issue before her mother. *BD* died in October 1864 leaving a will, of which she appointed her brother *G* executor, and *G*, in accordance with the directions in her will, took possession of the property, which *B D* took as widow and under the will of *P*. *K* died in 1855, when still a minor, leaving a minor widow, and having made a will, by which he gave permission to his widow to adopt a son. The widow of *K* adopted a son in August, 1876. In a suit brought by the plaintiff as adopted son of *K* and heir of *P*, to recover the property left by *P*, the issue was raised whether, assuming the plaintiff to be the legally adopted son of *K*, he was the heir of *P*. HELD, that his adoption not having

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taken place when the succession to the property of *P* opened out on the death of *B D*, he was not entitled to the property; his adoptive mother could not claim on the death of *B D* to hold the property as trustee for the plaintiff: and inasmuch as the property must have vested in some one on the death of *B D*, and property once vested cannot, by Hindu law, be divested, the plaintiff was not entitled to succeed.

SUIT for declaration of right to, and possession of, certain immoveable property.

The facts, as far as they are material to this report, were as follows:—Petambur Ghose, a Hindu inhabitant of Calcutta, died in August, 1825, leaving two sons, Parbutty Churn Ghose and Bhugoban Chunder Ghose, and two widows, and leaving a will, by which he gave all his property to his two sons absolutely in equal shares; and Parbutty and Bhugoban took possession of all the property, and constituted a joint Hindu family. In October, 1845, Bhugoban died, leaving a widow, Potitpaboni, and an infant son, Khetter Mohun, and leaving a will, of which he appointed his widow sole executrix, and by which, after making provision for the worship of certain idols, he gave all his property, moveable and immoveable, to his son Khetter Mohun Ghose absolutely; and Potitpaboni Dossee and Khetter Mohun continued to live as members of the joint family. In May, 1855, Khetter Mohun Ghose died at the age of 15 years and 8 months, leaving his mother, Potitpaboni, and his widow, the defendant Bamasoondery, a minor, and having made a will, of which he appointed his mother executrix, and by which he, among other things, directed that when his widow attained majority she should adopt a son, and that as long as such adopted son was a minor, Potitpaboni should hold the property for him and make it over to him on his attaining majority: and the defendant Bamasoondery, on attaining majority, obtained letters of administration to the estate of Khetter Mohun in July, 1861. In August, 1876, the defendant Bamasoondery adopted the plaintiff, a minor, in pursuance of the will of Khetter Mohun Ghose. Parbutty Churn died in 1851 without male issue, leaving a widow, Bindadebee Dossee, his heiress, and a daughter Kristo Mohiney Dossee, and having made his will, of which he appointed his widow executrix, and by

which he gave all his property (subject to certain legacies and annuities, and certain trusts for the worship of the family idols) to his widow for life, and on her death, to his daughter's sons if any; and on his death his widow took and continued in possession of the whole of his property. Kristo Mohiney died intestate and childless in the lifetime of her mother. Bindadebee died in October, 1864, leaving a will, whereof she appointed her brother, Issurchunder Mitter, since deceased, sole executor; and whereby she directed that, on his death, the defendant Gocool Chunder Mitter should be her executor: and by her will she directed that her executor should take possession of the whole of the immoveable property which she had up to her death possessed and enjoyed according to the will of Parbutty Churn, and should, out of the said property, as directed in the wills of Petambur Ghose and Parbutty Churn, defray the expenses of the worship of the idols and perform all other religious and pious acts. Gocool Chunder, eventually, on the death of Issur Chunder in 1874, obtained probate of the will and possession of the property as executor of Bindadebee. The defendant Gocool Chunder refusing to give up the property, the plaintiff brought the present suit against Gocool Chunder and Bamasoondery for a declaration that he was the duly adopted son of Khetter Mohun, and that as such duly adopted son he was entitled, as heir of Parbutty Churn, to the property left by him. The defendant Gocool Chunder put the plaintiff to proof of his title, and submitted that the claim was barred, more than twelve years having elapsed since the death of Bindadebee, when the property descended.

The case came on before Pontifex, J., for settlement of issues, and it was then suggested by the Court that, in the case of the plaintiff failing to prove his claim, the Government might have an interest in the property; and it was ordered that the Government should be made a party to the suit; and the preliminary issue was settled for argument, whether, assuming the plaintiff to be the lawfully adopted son of Khetter Mohun, he was the legal heir to Parbutty Churn. The case now came on for argument of this issue before Pontifex and Mitter, JJ.

Mr. *J. D. Bell*, Mr. *Evans*, and Mr. *Bonnerjee* for the plaintiff.

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Mr. *Montriou* for the defendant Gocool Chunder.

The Standing Counsel Mr. *Kennedy* (with him *The Advocate-General*, offg., Mr. *Paul*) for the Secretary of State.

Mr. *Bell* contended that, on the broad principles laid down as to the succession of an adopted son, the plaintiff was entitled to succeed to the estate of Parbutty. He succeeds to collateral as well as to direct relations—*Sumbhoo Chunder Chowdhry* v. *Naraini Dibeh* (1) and *Lokenath Roy* v. *Shamasoonduree* (2). In this case the estate must have vested in some person, and there was no one else in whom it could vest; therefore, it must be considered to have vested in the adopted son. And this is so though he did not come into existence until after the testator's death. The position of an adopted son is a peculiar one, and forms an exception to the usual rule that a person to take must be in existence when the gift takes effect: see *Jotindra Mohun Tagore* v. *Ganendra Mohun Tagore* (3). He is recognised, whether adopted by the father himself, or by a person empowered by him, after his death, as standing in the same position as a child actually begotten by the father. In this case, on his adoption, this estate must be considered as having vested in the adopted son at the testator's death, or rather at the date of the permission to adopt. The cases as to property not being liable to be divested do not apply to the plaintiff here; see *Kalidas Das* v. *Krishna Chandra Das* (4). Here the plaintiff must be considered to have been begotten and in the womb of his adoptive mother from the date of the permission to adopt. [PONTIFEX, J.—If Parbutty had died without a will, his widow would have taken a life estate as heir, but she had an estate left her by will. How does she take? By English law she would take as devisee; see *Strickland* v. *Strickland* (5). If she takes as devisee and not as heir, we must look for her successor at Parbutty's death, and at that time the heir was Kristo Mohiney, his daughter.] It is submitted she took as devisee.

(1) 3 Knapp, 55.
(2) S. D. A., 1858, 1863.
(3) 9 B. L. R., 377, at p. 397.
(4) 2 B. L. R., F. B., 103.
(5) 10 Sim., 374.

Mr. *Montriou* for the defendant Gocool Chunder.—There was in the widow the meeting of two inconsistent estates, and the lesser one was merged in the larger: she succeeded as heir to the whole estate, and that right was not superseded by the fact that she held her husband's permission to adopt. The right of an adopted son only vests in him from the date of the actual adoption—*Bamundoss Mookerjee* v. *Mussamut Tarinee* (1). This case was confirmed on appeal by the Privy Council. The widow does not hold the estate as a trustee—*Rash Behari Roy* v. *Nemaye Churn* (2). The widow there had the full and complete title as heir to the whole estate. The analogy of a Hindu widow with a permission to adopt is not that she is to be considered *enceinte* at the death of her husband, and as remaining so until adoption; but that she is in a position to give birth to a son at any time she likes, the permission to adopt being a substitute for her husband; see the case of *Sri Raghunadha* v. *Sri Brojo Kishore* (3). The defendant Gocool is not a wrong-doer; he is, if the widow did not take the complete estate as heir, in the position of a stakeholder, and the plaintiff must prove his title to the property which he claims: he must succeed by the strength of his own title, and not by reason of any weakness in ours. The Government cannot claim against this defendant as if they were plaintiffs.

The *Standing Counsel* Mr. *Kennedy* for the Government.—The estate, when it had once vested, could not be divested in favour of the adopted son—*Kalidas Das* v. *Krishna Chandra Das* (4) and *Lakhi Prya* v. *Bhairab Chandra Chaudhri* (5). No authority has been cited in favour of the analogy between a widow with a power to adopt and a lengthened period of gestation. The son had no right whatever until adoption—*Bamundas Mookerjee* v. *Mussamut Tarinee* (6) and *Dossmoney Dossee* v. *Prosonomoye Dossee* (7). The plaintiff not being in existence when the

(1) S. D. A., 1850, 533; S. C. on appeal, 7 Moore's I. A., 169.

(2) W. R., 1864, 223.

(3) L. R., 3 I. A., 154, at p. 193; S. C., I. L. R., 1 Mad., 69, at p. 83.

(4) 2 B. L. R., F. B., 103.

(5) 5 Sel. Rep., 315.

(6) 7 Moore's I. A., 169.

(7) 2 I. J., N. S., 18.

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succession opened, was not capable of taking—*Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1).

Mr. *Bell* in reply.—A son born in the natural way can claim mesne profits of an estate during the period of gestation. [PONTIFEX, J.—Is that so?] It is submitted he could. Suppose a person dies leaving property in the hands of a manager, and no heir comes forward for some years, the account would, in a suit by the heir, date back to the death of the last owner. [PONTIFEX, J.—But here the widow was entitled to the income for her life at any rate.] The passage cited from *Sri Raghunadha* v. *Sri Brojo Kishore* (2) is in the plaintiff's favor. The Government has no title as long as any one is in existence who can benefit the ancestor's soul. The Hindu text-books show in what cases the king would take an estate, and those in which he would not take; see the Dayabhaga, Ch. IX, sec. I, and Menu, Ch. IX, verse 189. [PONTIFEX, J., referred to *The Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (3). Suppose the Government had taken the estate in default of heirs and had sold it.] The sale would have been subject to the birth of a child,—*i. e.*, in this case the adoption. The heir must be some one who can perform the ceremonies for the good of the ancestor. [Mr. *Kennedy* referred to a passage in the Vyavastha Darpana, 1st ed., 295, and to a recent case decided the other way (4).] It is submitted a stranger like the defendant cannot perform the ceremonies. No authority has been cited to show that an estate cannot be divested in favor of an adopted son. The case of *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (1) shows that no power exists on the part of the father to give power to his widow to adopt a son who should interfere with any direct male issue. [MITTER, J.—That case shows the vesting would date from the actual adoption, not from the permission to adopt. PONTIFEX, J., referred to the case of *Gobinda Nath Roy* v. *Ram Kannay Chowdhry* (5).] If the first adopted son had died, the power would have conti-

(1) 10 Moore's I. A., 279.

(2) L. R., 3 I. A., 154, at p. 193; S. C., I. L. R., 1 Mad., 69, at p. 83.

(3) 8 Moore's I. A., 521.

(4) *Shibnath Dhur* v. *Badacoomaree Dossee*, decided by Garth, C.J., and Pontifex, J., on 30th March, 1876, affirming on appeal a decision of Markby, J., dated 11th of June, 1875.

(5) 24 W. R., 183.

nued, and another might have been adopted; see *Ram Soondur Singh* v. *Surbanee Dossee* (1) and *Bhoobun Moyee Debia* v. *Ram Kishore Acharj Chowdhry* (2). The adopted son is to be considered a posthumous son. There is no authority for saying that where an estate is not owned by any one, it is not to belong to Government rather than to a person in the position of the defendant Gocool Chunder.

Cur. adv. vult.

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The judgment of the Court was delivered by

MITTER, J.—The following genealogical table will materially help in setting out the facts of this case:—

PITAMBUR GHOSE.
Died August, 1825.

Parbutty Churn Ghose, (Died 1851) Married Bindadebee Dossee (Died 1864)	Bhugoban Chunder Ghose, (Died October 1855) Married Potitpaboni Dossee
Daughter Kristo Mohiney Dossee, Died childless between the deaths of Parbutty and Bindadebee.	Khetter Mohun Ghose (Died 1855) Married Bamasoondery Dossee, who, after her husband's death, in August, 1876, adopted KALLY PROSONNO GHOSE, *the plaintiff.*

The plaintiff in this case is the alleged adopted son of Khetter Mohun, and the defendant is the brother of Bindadebee, widow of Parbutty, whose property is the subject-matter of dispute in the present case. Parbutty died in 1851, leaving him surviving Bindadebee his widow, Kristo Mohiney a daughter, and Khetter Mohun his brother's son. He executed a will before his death, bequeathing all his property to Bindadebee for life, and the remainder to daughter's sons that might be born thereafter. These bequests were subject to certain trusts for carrying out the worship of the family idols mentioned therein. Under this will Bindadebee remained in possession of the disputed property up to the time of her death, in 1864. In the meantime, both Kristo Mohiney and Khetter Mohun died, childless.

(1) 22 W. R., 121. (2) 10 Moore's I. A., 279.

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Khetter Mohun, it is alleged, before his death executed a will, which contains, among other provisions, a permission to his wife Bamasoondery to adopt. But the adoption of the plaintiff, in pursuance of this alleged permission, as admitted in the plaint, did not take place until 1876. Bindadebee, who died in October, 1864, left all her properties, including those now in dispute, to her brother Issur Chunder. The defendant Gocool, who is the brother of Issur Chunder, has succeeded to them after the death of Issur. Thus, under the will of Bindadebee the properties in dispute have remained in the possession of Issur and Gocool, successively, from October, 1864, when Bindadebee died. The plaintiff, it is said, as stated before, was adopted in August, 1876, and he claims all these properties as the heir of Parbutty.

Various questions have been raised by the defendant, but the issue which we have now to determine is this:—Assuming that the plaintiff is the lawfully adopted son of Khetter Mohun, is he the legal heir to Parbutty?

If the plaintiff's adoption had taken place before the death of Bindadebee, there can be little doubt that, upon the facts stated above, he would have been the legal heir to Parbutty. But the question which we have to determine in this case is, whether, he having not been adopted at the time when the succession to Parbutty's estate opened out on Bindadebee's death, his subsequent adoption would confer upon him any right as legal heir of Parbutty to claim these properties from the hands of a person, who, with his predecessor in title, had remained in possession of them for nearly twelve years before the institution of the suit, and is still in possession.

In the year 1864, when Bindadebee died, the properties in dispute must have devolved on some person or persons, because there can be no property without an owner. The plaintiff was not then in existence as the adopted son of Khetter Mohun. To whom then did they pass? Putting the will of Bindadebee on one side, because for the purpose of this issue it is not disputed by the defendant that it must be assumed that it did not operate to create any valid title in his favor, the ownership of these properties must have vested either in some person who

was under the Hindu law the reversionary heir to Parbutty after the death of Bindadebee, or in the Government, if no such person was in existence.

The contention of the plaintiff that, on the death of Bindadebee, his adoptive mother became entitled to hold these properties as the trustee of the future adopted son, is not, I think, sound. No texts in the Hindu law have been cited in support of it, and so far as the authority of decided cases goes, the question seems to have been settled conclusively against any such view.

In the case of *Ramundoss Mookerjee* v. *Mussamut Tarinee* (1), a Hindu widow, having authority to adopt, brought a suit in her character as widow, to recover possession of her husband's share of the family property. She was met with the objection, that the suit brought in her capacity as widow was badly framed, because possessing an authority to adopt, she could only sue on behalf of her future adopted son. This objection was overruled, and it was held, "that the mere fact of there being authority given by her husband to adopt a son, did not, before an adoption had actually taken place, supersede and destroy her personal right as widow to sue." The point seems to have been more directly decided in two other cases, *Dukhina Dossee* v. *Rash Beharee Mojoomdar* (2) and *Gobind Chandra Surma Mozoomdar* v. *Anand Mohan Surma Mozoomdar* (3). On the death of Bindadebee, therefore, the plaintiff's adoptive mother could not claim to hold possession of the properties in dispute in trust for the future adopted son. The ownership in them must have vested then either in some person whose name has not been disclosed in this case, and who was the reversionary heir to Parbutty after the death of Bindadebee, or in the Government, if no such person was in existence.

This being so, the plaintiff cannot succeed in this case, unless he can establish that, on his adoption, the ownership of these properties was divested from the person who had succeeded to them upon the depth of Bindadebee, and vested in himself. If this proposition could be established, it would lead

(1) 7 Moore's I. A., 169. (2) 6 W. R., 221. (3) 2 B. L. R., A. C., 313.

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in many cases to very mischievous and inconvenient results. There is no limitation of time within which a Hindu widow is bound to exercise the right of adoption, and there might be cases not of unfrequent occurrence, in which persons rightfully succeeding to properties as heirs might, after a long lapse of time, be suddenly called upon to relinquish their possession in favor of a person adopted into the family of the last owner many many years after the death of the latter. A proposition so startling as this is ought to be established by the clearest possible authority.

No text from the Hindu law has been cited in its support. On the other hand the definition of 'heritage,' as given in the Dayabhaga, paragraphs 4 and 5 of Chap. I, tends to lead to the opposite conclusion. These paragraphs are to the following effect:—

"The term 'heritage,' by derivation, signifies what is given. However, the use of the verb (da) is here secondary or metaphorical: since the same consequence is produced,—namely, that of constituting another's property after annulling the previous right of a person who is dead or gone into retirement or the like. But there is no abdication of the deceased, and the rest in regard to the goods. Therefore, the word 'heritage' is used to signify wealth in which property dependent on relation to the former owner arises on the demise of that owner." When a person, therefore, succeeds to a property by right of inheritance under the Hindu law, in the language of the Dayabhaga this consequence is produced,—namely, that of constituting another's property after annulling the previous right of a person who is dead or gone into retirement or the like. His right is, therefore, absolute, and carries with it all the natural incidents of ownership, unless otherwise controlled by any other express provision of the law. In the case of succession by females, we know there are such express provisions relating to the right of transfer by sale, gift, &c. But I am aware of no authority in Hindu law books which supports the proposition that this right of ownership is subject to be destroyed by a person being brought into existence subsequently, a person who, if he had been in existence at the time when the succession opened out, would have been a

preferable heir. This is opposed to natural justice and all principles of the Hindu law.

In the Full Bench case of *Kalidas Dass* v. *Krishna Chandra Dass* (1), Sir Barnes Peacock takes the same view of the law. The question in that case was, whether the estate of a deceased person, which became vested in his nephew, his son having been excluded from inheritance on the ground of congenital blindness, could be divested in favor of the blind man's son born after the succession of the nephew. "There is no case of which I am aware," says Sir Barnes Peacock (page 110), "in which, according to the Hindu law as administered in Bengal, a male who takes by descent takes anything less than a full and absolute estate subject to charges for maintenance, &c., or to show that he is not at liberty to alienate that estate by gift or sale. The cases of widows, and sons adopted after the deaths of their adoptive fathers, were referred to in the course of argument, to show that an estate, less than a full and absolute estate, may be taken by inheritance, and that an estate vested by descent may be divested. But these cases are not analogous. The case of a widow succeeding to the estate of her husband upon his dying without issue, and the case of other females, depend upon particular texts. Baudhayana, after premising a woman is entitled, proceeds 'not to the heritage; for females and persons deficient in an organ of sense or member are deemed incompetent to inherit.' The construction of this passage, 'a woman is not entitled to the heritage,' is, that the succession of the widow and certain others (*viz.*, the daughter, the mother, and the paternal grandmother) takes effect under express texts without any contradiction to this maxim—Dayabhaga, Chap. XI, sec. 6, verse 11. The case of a widow adopting a son after her husband's death, and thereby divesting the estate which she took upon the death of her husband without issue, is one in which only her own estate is divested. There is no case in which an estate vested in a male heir by inheritance can be divested by the adoption of a son by a widow after her husband's death, and the case of a widow divesting her own estate by the adoption of

(1) 2 B. L. R., F. B., 103.

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a son is not one from which inferences can be drawn by analogy as to the divesting of an estate once vested in a male heir by inheritance." The observations of the Judicial Committee of the Privy Council in *Ram Kishore Acharj* v. *Mussamut Bhoobun Moyee Dabia* (1) and in *The Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (2), lend considerable support to this conclusion.

The facts in the case of *Ram Kishore Acharj* v. *Bhoobun Moyee Debia* (1) are briefly these:—One Gour Kishore died, leaving him surviving his widow, Chundrabullee, and an infant son, Bhowanee Kishore. He, before his death, executed an *anumati-patro*, giving authority to the widow to adopt a son, in case Bhowanee Kishore died childless. After his death, Bhowanee Kishore succeeded to his property, and died childless after having married Bhoobun Moyee. Chundrabullee, after Bhowanee Kishore's death, adopted Ram Kishore. The question that had to be determined in the case was, whether Ram Kishore was entitled to take possession of the properties left by Bhowanee Kishore by evicting Bhoobun Moyee. "The question is," their Lordships observe in page 311, "whether the estate of his son being unlimited, and that son having married and left a widow his heir, and that heir having acquired a vested estate in her husband's property as widow, a new heir can be substituted by adoption who is to defeat that estate and take as an adopted son what a legitimate son of Gour Kishore would not have taken. This seems contrary to all reason and to all the principles of Hindu law, as far as we can collect them." Again, further on, they say: "If Bhowanee Kishore had died unmarried, his mother, Chundrabullee Debia, would have been his heir, and the question of adoption would have stood on quite different grounds. By exercising the power of adoption, she would have divested no estate but her own, and this would have brought the case within the ordinary rule; but no case has been produced, no decision has been cited from the text-books, and no principle has been stated to show that, by the mere gift of a power of adoption to a widow, the estate of the heir of a deceased son vested in

(1) 10 Moore's I. A., 279. (2) 12 Moore's I A., 397.

possession can be defeated and divested." The "ordinary rule" referred to in this passage seems to be, that in no case "the estate of the heir of a deceased 'person' vested in possession can be defeated and divested" in favor of a subsequent adopted son, unless the adoption is effected by the direct agency of the former or with his or her express consent.

In the other case, *Collector of Madura* v. *Moottoo Ramalinga Sathupathy* (1), I think the same rule has been enunciated. The main question for decision in that case was, whether, in the Dravida country in the Madras Presidency, a widow not authorised by her husband to adopt may adopt a son to him if authorised by the consent of his kinsmen. Having decided this point in favor of the validity of such adoption, their Lordships make the following observation regarding the question: "Who are the kinsmen whose assent will supply the want of positive authority from the deceased husband?" In page 441 they say:—"Where the husband's family is in the normal condition of a Hindu family, that is undivided, that question is of comparatively easy solution. In such a case the widow, under the law of all the schools which admit this disputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorise an adoption by her, yet, if there be no father, the consent of all the brothers, who in default of adoption would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will." In the case of succession by the widow to the separate property of her husband, the adoption taking place through her agency, has, in accordance with the rule laid down above, the effect of divesting her estate.

Following this rule, this Court, in *Gobindo Nath Roy* v. *Ram Kanay Chowdhry* (2), has held, that the subsequent adoption by a widow cannot affect the right of an alienee from her, the

(1) 12 Moore's I. A., 397; S. C., 1 B. L. R., P. C., 1. (2) 24 W. L. R., 183.

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alienation having taken place before the adoption. This case is exactly in point, and is a direct authority against the contention of the plaintiff.

The learned Counsel for the plaintiff, in the course of argument, has relied upon the following observation of the Judicial Committee in the well-known case of *Tagore* v. *Tagore*. This passage, which is to be found in page 397 of 9 Bengal Law Reports, is to the following effect:—"As to the case of adopted children (so much relied upon during the argument) it is distinguishable, because of the peculiar law applicable to that relation. The Hindu law recognizes an adopted child, whether adopted by the father himself in his lifetime, or by the person to whom he has given the power of adoption after his death, from amongst those of his class, as one to stand in the place of a child actually begotten by the father. In contemplation of law such child is begotten by the father who adopts him, or for and on behalf of whom he is adopted. Such child may be provided for as a person whom the law recognizes as in existence at the death of the testator, or to whom, by way of exception, not by way of rule, it gives the capacity of inheriting, or otherwise taking from the testator, as if he had existed at the time of the testator's death, having been actually begotten by him. Apart from this exceptional case, which serves to prove the rule, the law is plain that the donee must be a person in existence, capable of taking at the time when the gift takes effect." Their Lordships make these observations in connection with the question, whether, by the Hindu law of gift, a gift made to a person not in existence at the time of such gift, is valid; having decided that it is not valid, they say that such gifts by the adopted father in favor of a future adopted son form an exception to the general rule, and the words "as if he had existed at the time of the testator's death having been actually begotten by him" do not refer to a case of collateral succession by an adopted son, but to his right of inheritance to his adoptive father's estate.

General observations of their Lordships of the Judicial Committee, similar to those quoted above, made in the case of *Sri Raghunadha* v. *Sri Brojo Kishore* (1), have also been pressed

(1) L. R., 3 I. A., 154.

upon our attention on behalf of the plaintiff. The passage quoted, to be found at page 193 of the third volume of the law Reports, Indian Appeals, is as follows: "Their Lordships have deemed it right to make these remarks, though not essential to the determination of the present appeal, because this doctrine of the power of a widow, not having her husband's express permission to adopt a son to him, which before the decisions in the *Ramnad case*, had not assumed very definite proportions, has obviously an important bearing upon the law of property in the Presidency of Madras. It may be the duty of a Court of Justice administering the Hindu law to consider the religious duty of adopting a son as the essential foundation of the law of adoption, and the effect of an adoption upon the devolution of property as a mere legal consequence. But it is impossible not to see that there are grave social objections to making the succession of property, and it may be in the case of collateral succession, as in the present instance, the rights of parties in actual possession, dependent on the caprice of a woman subject to all the pernicious influences which interested advisers are too apt in India to exert over women possessed of or capable of exercising dominion over property." That "the rights of parties in actual possession" in this passage do not refer to any vested rights, will be apparent by referring to the particular facts of that case. The property in dispute in that case was not a joint family property, and the surviving members of the joint family unjustly took possession of it, by excluding the widow of the owner, who was entitled by the Mitakshara law to succeed to it. Therefore, "the rights of parties in actual possession" in that case were not vested rights, but merely the reversionary rights to succeed after the death of the widow. That such contingent rights are liable to be defeated by an adoption is not disputed for one moment. These observations, therefore, do not in any way support the contention put forward on behalf of the plaintiff.

As a last resort an argument based upon the particular provision in Parbutty's will regarding the worship of certain family idols, has been pressed upon us in support of the plaintiff's right. It has been said that the defendant, being a stranger to the family,

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is not competent to carry out the direction as to the worship of the family idols. The defendant is a Hindu and a relative of the family; and I am aware of no rule of law or custom which would render him incompetent to carry out the worship of the aforesaid idols as directed in the will of Parbutty. Even if this contention were well founded, I do not see how it would help the plaintiff in establishing his right to inherit to the estate of Parbutty, he having not been adopted when the widow of Parbutty died.

For these reasons I am of opinion that this particular issue must be decided against the plaintiff.

PONTIFEX, J.—I quite concur in the judgment which has just been delivered by my learned colleague. As our decision is against the plaintiff on that issue, his suit must be dismissed as against Gocool and the Government. But as the principal defendant has not set up any right in himself, but claims to hold Parbutty's property only for the true owner, I think the dismissal should be without costs. For the same reason I think that Gocool should, out of the estate of Parbutty in his hands, pay the costs of the Government, whom I directed to be made defendants, and retain his own costs. The dismissal of the suit against Gocool will be without prejudice to the rights (if any) of the Government in relation to Parbutty's property.

Suit dismissed.

Attorney for the plaintiff: Mr. *Leslie.*

Attorneys for the defendant Gocool Chunder: Messrs. *Sen and Farr.*

Attorney for the Government: The *Government Solicitor* Mr. *Sanderson.*

APPELLATE CIVIL.

Before Mr. Justice Kemp and Mr. Justice Ainslie.

THE BANK OF HINDOOSTAN, CHINA, AND JAPAN, LIMITED (PLAINTIFFS) *v.* SHOROSHIBALA DEBEE AND ANOTHER (DEFENDANTS).*

1877 *March* 16.

Mortgage—Reg. XVII of 1806—*Service of Notice of Foreclosure.*

The provisions of s. 8 of Reg. XVII of 1806, that a copy of the mortgagee's application to foreclose is to be served with the Judge's perwanna referred to in that section, are imperative and not merely directory. Where the evidence fell short of proof that a copy of such application was served with the perwanna of the Judge,—*Held*, that such failure of proof was fatal to the plaintiff's suit to recover possession of the mortgaged premises after the expiration of the year of grace.

When the plaintiffs, second mortgagees who had foreclosed their mortgagor's equity of redemption, sued for possession of the mortgaged property, and alleged that their mortgagor's equity of redemption had been finally foreclosed by the first mortgagee after due proceedings and expiry of the year of grace without redemption, and that they were, therefore, entitled to absolute possession, and failed on the ground that notice of foreclosure had not been duly served,—*Held*, they were not entitled to a decree as mortgagees for possession, subject to their accounting to the mortgagors, that being relief different from that prayed for in their plaint.

SUIT by mortgagees to obtain absolute possession, after foreclosure, of two zemindaries, Turuf Bhowani Churn and Nilam Bhowani Churn. These estates had, as the plaint alleged, formerly belonged to the defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya, who, by a mortgage in the English form, dated the 4th of September, 1863, mortgaged the estates to a person named Gobind Chunder Sen. The mortgage stipulated that the mortgage loan was to be repaid on the 4th of September, 1868. On the 29th of December, 1866, Gobind Chunder Sen executed a transfer, by way of mortgage in the English form, of his interest under the mortgage deed of the 4th of September, 1863, to the plaintiff Bank. On an application by Gobind Chunder Sen under the provisions of Reg. XVII of 1806, the mort-

* Regular Appeal, No. 155 of 1875, against a decree of J. P. Grant, Esq. Officiating Judge of Zilla Chittagong, dated the 9th of April, 1875.

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gage of the 4th September, 1863, was foreclosed on the 4th of December, 1866. After the death of Gobind Chunder Sen, his son, the defendant Nundo Lall Sen, on the 15th of April, 1868, brought a suit for possession of the disputed properties comprised under the mortgage of the 4th of September, 1863, and obtained a decree in the Court below; but, on appeal, this decision was reversed by the High Court, on the ground that the suit was premature, and the whole of the proceedings, including the foreclosure in December, 1866, were set aside. On the 12th of January, 1871, Nundo Lall Sen applied under the Regulation for foreclosure of the mortgage of the 4th September, 1863. From the report of the serving peon it appeared that the notice had been served on the 25th of February, 1871, by affixing a copy on the outer door of the house of the defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya. The serving peon was subsequently examined by interrogatories, but there was nothing in the evidence to show that a copy of Nundo Lall Sen's application for a foreclosure had been served as required by s. 8 of Reg. XVII of 1806. The mortgagors, under the mortgage of the 4th of September, 1863, failed to deposit the money with interest due to Nundo Lall Sen within the year of grace prescribed by the Regulation, and the mortgage became foreclosed on the 26th of February, 1872. The plaintiff Bank, on the 23rd of October, 1870, applied to the Zilla Court to foreclose against the defendant Nundo Lall Sen the mortgage of the 29th of December, 1866, from his father Gobind Chunder Sen, and the year of grace under those foreclosure proceedings expired on the 13th of September, 1872; the mortgage-money not having been paid in the *interim*. The plaintiff Bank, therefore, brought this suit, alleging that the defendants, Shoroshibala and Hemendro, were in wrongful possession of the zemindaries, their title to retain possession being lost. The plaintiff Bank prayed that the Court would put them in possession of the property, their full title being established, and award them mesne profits for the time they had been wrongfully kept out of possession, and grant them such other relief as they were entitled to. They stated that their cause of action accrued on the 13th of September

1872, the date of the foreclosure of the mortgage of the property hypothecated.

The defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya pleaded, *inter alia*, that the proceedings for the foreclosure of the mortgage of the 4th of September, 1863, were irregular and invalid, inasmuch as the notice of foreclosure had not been duly served upon them in accordance with the Regulation. The case was tried by the Officiating Judge, who was of opinion that there was no proof of the service of the mortgagees' application for foreclosure of the mortgage of the 4th of September, 1863, on the defendants Shoroshibala Debee and Hemendro Nath Mookhopadhya, as required by the Regulation, and that this defect was fatal to the plaintiffs' suit, which was consequently dismissed.

The plaintiffs appealed to the High Court.

The *Advocate-General*, offg. (Mr. *Paul*) and Mr. *Stokoe* for the appellants.

Baboos *Nilmadhub Bose* and *Nulit Chunder Sen* for the respondents Shoroshibala Debee and Hemendro Nath Mookhopadhya.

The defendant Nundo Lall Sen did not appear on the appeal.

The *Advocate-General.*—The service of the Judge's perwanna alone is sufficient. The Sheriff's return, coupled with the evidence of the peon, sufficiently shows that, in fact, a copy of the application did in fact accompany the notice. Hemendro Nath was not examined to prove the contrary. The decision in the case of *Denonath Gangooly* v. *Nursing Proshad Dass* (1), relied on by the Lower Court, proceeds upon a mistaken view taken by the Court of the practice on the Original Side of the Court with regard to the service of notices of foreclosure. The learned *Advocate-General* said, that he had an affidavit showing what the practice in this respect was, but he submitted that, at any rate, their Lordships would themselves, by inquiry of their own office, ascertain what really was the practice. Every presumption should be made in favor of the regularity of service—*Rex* v. *Inhabitants of Whiston* (2).

(1) 14 B. L. R., 87. (2) 4 Ad. & Ell., 607.

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Mr. *Stokoe* on the same side.—The provisions of the Regulation are directory only—Maxwell's Interpretation of Statutes, 330—342; *The Liverpool Borough Bank* v. *Turner* (1); *Nowell* v. *Mayor of Worcester* (2); *Read* v. *Croft* (3). There is no earlier decision to be found than that of *Santee Ram Jana* v. *Modoo Mytee* (4), to the effect that service of application is essential. In the case of *Denonath Gangooly v. Nursing Proshad Dass* (5), the only authority referred to by Markby, J., is Construction S. D. A., No. 644, which apparently has no bearing on the point. On this point the following cases and authorities were also cited: *Nawab Futeh Alee Khan* v. *Amatoon Hossein Begum* (6), *Koonjoy Sutbhama* v. *Sheopursun Singh* (7), *Ashootosh Deb* v. *Goolzar Beebee* (8); Construction S. D. A., No. 630; Macpherson on Mortgages, 174, 184,—6th ed., 212, 219; Field's Regulations, 376; *Mahesh Chandra Sen* v. *Tarini* (9), *Saligram Tewaree* v. *Beharee Misser* (10), and *Eusuf Ali Khan* v. *Azumtoonissa* (11).

It has been held in cases of sales of patni taluks under Reg. VIII of 1819, that the provisions regarding service of notice of sale are directory only, and not imperative—*Sona Bebee* v. *Lall Chand Chowdhry* (12), *Ram Sabuk Bose* v. *Kaminee Dossee* (13), *Petambur Panda v. Damoodur Das* (14), *Gouree Lall Singh* v. *Joodhisteer Hazra* (15). If the foreclosure proceedings are ineffectual, the mortgagees are, at any rate, entitled to possession subject to the mortagagors' right to redeem under the express terms of the mortgage deed—*Prannath Chawdhry* v. *Ram Rutton Roy* (16), *Khelut Chunder Ghose* v. *Tarachurn Koondoo* (17), *Denonath Gangooly* v. *Nursing Proshad Dass* (5), and *Mankee Koer* v. *Sheikh Munnoo* (18). The Court can give that relief in this suit on the frame of the present issues; see Act VIII of 1859, s. 141: *Hunooman Persaud Panday* v. *Musst. Babooee Munraj*

(1) 2 De G. F. & J., 502.
(2) 23 L. J., Exch., 139.
(3) 6 Scott's Cases, 770.
(4) 20 W. R., 363.
(5) 14 B. L. R., 87.
(6) S. D. A. (1858), 1775.
(7) S. D. A. (1854), 281.
(8) *Id.*, 511.
(9) 1 B. L. R., F. B., 14.
(10) W. R. (1864), 36.
(11) *Id.*, 49.
(12) 9 W. R., 242.
(13) 14 B. L. R., 394.
(14) 24 W. R., 129.
(15) B. L. R., 1 Calc., 359.
(16) 4 W. R., P. C., 37; S. C., 8 Moore's I. A., 323.
(17) 6 W. R., 269.
(18) 14 B. L. R., 315.

Koonwaree (1), *S. M. Nistarini Dasi* v. *Makhan Lall Dutt* (2), *Arbuthnot* v. *Betts* (3), *Gopalnarain Mozoomdar* v. *Muddomutty Guptee* (4), *and Gobind Chunder Mookerjee* v. *Doorgapersad Baboo* (5).

Baboo Nil Madhab Bose for the respondents Shoroshibala Debee and Hemendro Nath Mookhopadhya.—The mortgagor was entitled, under the Regulation, to be furnished with a copy of the Judge's perwanna together with the notice of foreclosure. The evidence did not prove that this was sent. The procedure under s. 8 of the Regulation is not merely directory, but has to be carried out as a condition precedent to foreclosure—Construction S. D. A., No. 644; *Ibid*, No. 630; Macpherson on Mortgagees, 172—6th ed., 210; *Santee Ram Jana* v. *Modoo Mytee* (6), *Denonath Gangooly* v. *Nursing Proshad Dass* (7). On the evidence the Court cannot presume that the copy of the application was served. The plaintiffs are not legal representatives of Gobind Chunder Sen within the meaning of the Regulation. The Bank not having itself foreclosed as against Shoroshibala Debee and Hemendro Nath Mookhopadhya, cannot take advantage of the foreclosure of Nundo Lall Sen—*Sarasibala Debi* v. *Nanda Lall Sen* (8).

Mr. *Stokoe* in reply.

Cur. adv. vult.

The following judgments were delivered:

KEMP, J. (after stating the facts and the finding of the Judge, continued):—The main point argued before us for the Bank, the plaintiffs, appellants, was, whether there had been a legal service upon the defendants. S. 8, Reg. XVII of 1806, provides, "that whenever the receiver or holder of a deed of mortgage and conditional sale may be desirous of foreclosing the mortgage, and rendering the sale conclusive on the expiration of the stipulated period, or at any time subsequent before the sum lent is repaid, he shall, after demanding payment from the borrower,

(1) 6 Moore's I. A., 393, at p. 411.
(2) 9 B. L. R., 11, at p. 29.
(3) 6 B. L. R., 273.
(4) 14 B. L. R., 21, at p. 43.
(5) 14 B. L. R., 337.
(6) 20 W. R., 303.
(7) 14 B. L. R., 87.
(8) 5 B. L. R., 389.

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or his representative, apply for that purpose by a written petition, to be presented by himself, or by one of the authorized vakeels of the Court, to the Judge of the zillah or city in which the mortgaged land or other property may be situated; and that the Judge, on receiving such application, shall cause the mortgagor or his legal representative to be furnished, as soon as possible, with a copy of it, and shall at the same time notify to him, by a perwanna under his seal and official signature, that if he shall not redeem the property mortgaged in the manner provided for by the foregoing section within one year from the date of the notification, the mortgage will be finally foreclosed and the conditional sale will become conclusive." Now in this case notice of foreclosure was sent by the Officiating Judge of Chittagong to the High Court in the Original Side on the 14th of February, 1871. It is also clear that a copy of the applicant's petition for foreclosure was forwarded with that notice. The notice was entrusted to a peon, by name Kishto Roy, for service. He made the following return: "The within-mentioned defendants could not be found. On Saturday, the 25th of February, 1871, I affixed a copy of the notice on the outer-door of the house No. 11, Rutton Sircar's Garden Street, Jorasanko the dwelling-house of the defendants." The return of the Sheriff was to the following effect: "I do hereby certify and return that I have made dilligent search after the within-named Sreemutty Shoroshibala Debee and Hemendro Nath Mookerjee, but they are not, nor is either of them, found. I did, therefore, on Saturday, the 25th day of February instant, affix copies of the written notice on the outer-door of the house No. 11, Rutton Sircar's Garden Street, in Calcutta, where the said Sreemutty Shoroshibala Debee and Hemendro Nath Mookerjee are residing. Dated this 28th day of February, 1871." Therefore, from the returns of the peada and the Sheriff it is clear that no copy of the application of the mortgagee was furnished to the mortgagors. (After reading the evidence of the peon Kishto Roy, his Lordship continued):—This return of the peon and the Sheriff's answer, taken with the peon's evidence, in my opinion establish the fact that the notice was served on the mortgagors Shoroshibala and Hemendro Nath.

We have then to consider a further question,—namely whether the absence of the service of a copy of the written application for foreclosure is fatal to the plaintiffs' claim to foreclose. It was contended by the learned counsel for the appellant, that the Court must presume that the peon did his duty; and that as the notice which was sent down by the Zilla Judge shows that a copy of the application accompanied that notice, the Court must presume that the peada did his duty, and that the mortgagors were also furnished with a copy of the application to foreclose. It was further contended that the words of s. 8 so far as they relate to the duty of the Judge to furnish the mortgagors with a copy of the application for foreclosure, are directory and not mandatory, and that the Court must, therefore, presume that a copy of the application to foreclose was duly furnished to the mortgagors.

On the other hand, it was contended by the pleaders for the respondent, that the present objection is not a technical one; and that it has been uniformly held, both by the Sudder Court and this Court, that the procedure laid down in s. 8, Reg. XVII of 1806, must be strictly followed. The pleader also referred to the decisions in the case of *Denonath Gangooly* v. *Nursing Proshad Dass* (1) and *Santee Ram Jana* v. *Modoo Mytee* (2), where Markby, J., in a case in which singularly enough the same peada, Kishto Roy, was entrusted with the service of the process, held that the procedure according to the Regulation not having been strictly followed, the foreclosure could not be declared. I am clearly of opinion that it is absolutely necessary that the mortgagor should be furnished with a copy of the written application of the mortgagee to foreclose, for the Regulation enacts that a party who is desirous of foreclosing a mortgage shall apply to the Zilla or City Judge, and that the Judge, on receiving such application shall cause the mortgagor or his legal representative to be furnished, as soon as possible with a copy of it, that is of the application, and shall at the same time notify to him, the mortgagor, by perwanna under his seal and official signature, that if he shall not redeem

(1) 14 B. L. R., 87. (2) 20 W. R., 363.

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the property mortgaged in the manner provided for by s. 7 within one year from the date of the notification, the mortgage will be finally forclosed and the conditional sale will become conclusive. Now there may be a case in which there is more than one mortgage; and, therefore, it is very necessary that the mortgagor should be informed of the nature and contents of the written application made by the mortgagee; and the Regulation enacts that a mortgagee who is desirous of foreclosing a mortgage must carry out the requirements of the law. Further it is also necessary, that the mortgagor should be precisely informed as to the property or properties respecting which the mortgagee is desirous to foreclose. It is argued that, inasmuch as in the Court below the written statements of the principal defendants Shoroshibala and Hemendro Nath did not so much question the fact of a copy of the application having been furnished to them, as it did the fact of the service on them of the notice of foreclosure, if we can find that the notice was served, we ought, in the absence of any objection on the other side, either in the Court below, or as disclosed in the written statement, to hold that simple service of the notice, even if not accompanied by a copy of the application for foreclosure, is sufficient to meet the requirements of the law. Now, it is true that the fifth issue raised in the Court below was, Has notice of foreclosure been served on the defendants in this suit? and if the case had been tried on that issue alone, it might be that we should have come to a different decision as to the sufficiency of the service. But it is very clear that, at the hearing of the suit, both parties went to trial on a modified issue. The plaintiff accepted the modification of the issue originally drawn, and both parties argued in the Court below with reference to the question whether it was necessary that a copy of the application for foreclosure should accompany the notice and whether in fact such copy of the application did accompany the notice, and was furnished to the mortgagors. It was the duty of the plaintiffs, having accepted this modification of the issue, to prove that the mortgagors were furnished with a copy of this application. No interrogatories were sent down to the peon who served the notice as to whether a copy of the application accompanied the notice, and was made

over by him to the mortgagors. The plaintiffs never attempted to prove that a copy of the application either accompanied the notice, or was furnished to the mortgagors. We hold that it is absolutely necessary that a copy of the application should be furnished to the mortgagors; and as it is clear that such copy was not furnished, we must hold in this case that the claim of the plaintiffs to foreclose as against Hemendro Nath and Shoroshibala must fail; and we agree with the Judge on that part of the case.

Then it is contended that, at all events, this Court ought to declare that the plaintiffs are entitled to possession as against Hemendro Nath and Shoroshibala subject to the plaintiffs accounting for the usufruct, and leaving to the defendants the right of redemption. With reference to this contention, we find, that this was not the prayer of the plaintiffs in the Court below, nor was any such relief sought for in the plaint. We, therefore, cannot pass any order with regard to the question of possession.

It was further argued that, as against Nundo Lall Sen, who has not appeared in this Court, the plaintiffs are, at all events, entitled to a decree; and that the Court below was wrong in making the plaintiffs pay the costs of Nundo Lall Sen. We think, with reference to the judgment of the late Chief Justice Sir Richard Couch (1), that foreclosure should be declared as against Nundo Lall Sen, subject to the decree for reconveyance on repayment, which was made by this Court on appeal from the decision of Macpherson, J., on the 12th of May, 1873, as therein directed. We do not think it right to award any costs as against Nundo Lall Sen.

The appeal of the plaintiffs is dismissed with costs.

AINSLIE, J.—The first question in this case is whether service of a copy of the application for foreclosure, together with the notice required by s. 8 of Reg. XVII of 1806, is absolutely essential. It was held by Markby and Birch, JJ., in *Santee*

(1) *See* 11 B. L. R., 311 note.

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Ram Jana v. *Modoo Mytee* (1), that it was a condition precedent; and by Markby and Mitter, JJ., in *Denonath Gangooly* v. *Nursing Persad Dass* (2), that it was absolutely necessary. It has been said in the latter case, the language used by Markby, J., shows—that he did not then go quite so far as he did in the first case. He said that, "if it be necessary to establish the service of a copy of the application, it has not been done." From this the inference is drawn that there was some doubt in the mind of the learned Judge on the subject. It seems to me that this was not so, for if the preceding passage of the judgment be read with the penultimate passage, it is perfectly clear that he lays down that, without service of a copy of the application for foreclosure, there can be no foreclosure, and the same is broadly stated by Mr. Justice Mitter. The form of expression referred to probably resulted from the fact that, in that particular suit, it was necessary to dismiss the plaintiff's claim apart altogether from the question of due service of notice.

It has been argued that Reg. XVII of 1806 is a Regulation in relief of a mortgagor, whose title, but for the Regulation, is absolutely at an end by the contract on the expiry of the time limited in the contract; and that the order prescribing service of a copy of the application is directory merely, and not essential for the purpose of the Regulation, such purpose being simply to give due warning to the borrower that the lender intends to enforce his rights.

Under Reg. I of 1798 conditional sales were, undoubtedly, considered as binding contracts to be enforced according to their terms. But it seems to me that Reg. XVII of 1806, by barring the operation of the contract until the application for foreclosure, and for a year thereafter, has in effect changed their character—instead of being sales subject to a limited right of redemption, they have become contracts of security subject to be converted into absolute sales. This being now the nature of the transaction, we can only look upon foreclosure as a means of summarily terminating the rights of the mortgagors. It is, therefore, necessary for the Courts to hold that no part of the formalities

(1) 20 W. R., 363. (2) 14 B. L. R., 87.

prescribed by the Regulation is unessential. Two cases under the Putni Regulation VIII of 1819 have been cited,—one, the case of *Ramsabuk Bose* v. *Kamminee Dossee* (1), and the other, *Gouree Lall Singh* v. *Joodhisteer Hazra* (2), as being analogous to the present case. It seems to me that neither of those cases are in point. In the first case, which was before the Judicial Committee of the Privy Council, it was held, that inasmuch as actual service of the notice had been proved, that actual service could not be defeated by a defect in the form of the return. And the second case rather went upon the particular words of the 14th section of the Regulation, and the sale there was held good, although it was admitted that the law had not been strictly complied with; because it was said that there were no circumstances of prejudice, and that it was necessary for the purpose of setting aside the sale that, to use the language of the law, a "sufficient plea" should be made out; the Court held that the plea set forth was not sufficient.

The second point to be considered is, whether the notice was actually served, and if so, whether it was accompanied by a copy of the application for foreclosure.

(The learned Judge, after discussing the evidence, and finding it sufficient to prove the service of the notice, but not of the copy of the application for foreclosure, proceeded:)

We are, therefore, thrown back on the recital in the notice issued from the Judge's Court, that a copy of the application accompanied it, as the sole evidence in the case to establish the delivery of a copy of the application required by the Regulation; and it has been strongly contended that we ought to presume that every thing that Court ought to have done was done.

In the case of *Denonath Gangooly* v. *Nursing Proshad Dass* (3) Markby, J., distinctly refused to recognize this argument. It is said that he based his judgment on the practice of the Original Side of this Court; but that in respect of mofussil processes, the practice till recently was not to mention a copy of the application for foreclosure either in the Judge's order directing service, or in

(1) 14 B. L. R., 394. (2) I. L. R., 1 Calc., 359.
(3) 14 B. L.R., 87.

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the Sheriff's answer to it. It may be that the practice was as stated. But even if so, I think we ought not to rest the whole case of the plaintiffs on this presumption; foreclosure being an act which puts an end to the right of the mortgagor, it must be carried out strictly in accordance with the Regulation. It rests upon such notice as the law requires to be given, and it is eminently the duty of the mortgagee to see that every thing is done in conformity with the law, and to secure proper and sufficient evidence to show that the notice has been served in due compliance with the requirements of the law, in case he should be forced to come into Court to obtain a decree for possession in order to give full effect to the foreclosure. If this has not been done, he alone is to blame for it, and must take the consequences.

It is further said, that although the plaintiff may not be entitled to foreclosure in this case, he is entitled as mortgagee to an order for immediate possession subject to accounting to the mortgagor. In the case of *Sarasibala Debi* v. *Nanda Lall Sen* (1) a similar application was made, but the Court then declined to order possession to be given to the mortgagee on the ground that it was a distinct cause of action from that on which he had sued. It seems to me clear that we cannot in this suit make the order asked for from us. This is a suit brought on the allegation that a mortgage formerly subsisting had been terminated in consequence of the service of notice of foreclosure and the expiry of the year of grace. The plaintiff came into Court suing as actual owner of this property. What he now asks for is a right which can only be exercised by one who is a mortgagee, and not the actual owner of the property. His position is altogether changed; that which gives a cause of action in one case does not necessarily do so in the other. I, therefore, think we ought to refuse the application. To prevent any difficulties hereafter in any further litigation which may take place in respect of this mortgage, I think that there should be a distinct declaration that Nundo Lall's interest in the property under mortgage to his father is foreclosed, subject of course to such

(1) 5 B. L. R., 389.

conditions as may be imposed on that foreclosure by the decree made in the suit of the plaintiff against him disposed of in this Court on the 12th of May, 1873.

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I, therefore, concur in the order made by my learned colleague.

Appeal dismissed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Mitter.

AHMED MAHOMED PATTEL (DEFENDANT) *v.* ADJEIN DOOPLY AND ANOTHER (PLAINTIFFS).*

1876 *Sept.* 14.

Limitation—Act IX of 1871, *Sch. II, cl.* 113—*Specific Performance—Trust —Laches.*

In 1860 certain shares in a Company then formed were allotted to *S*, on the understanding, as the plaintiffs alleged, that 120 of such shares should, on the amount thereof being paid to *S*, be transferred to, and registered in the books of the Company in the names of, the plaintiffs. In 1862 the plaintiffs completed the payment to *S* in respect of the shares, and during his lifetime received dividends in respect of the said shares. *S* died in 1870, leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs and register the same in their names, the plaintiffs' case was that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. *Held*, that the transaction between *S* and the plaintiffs did not amount to "a trust for any specific purpose" within the meaning of s. 10 of the Limitation Act, or to a trust at all, but to an agreement of which the plaintiffs were entitled to specific performance; and the limitation applicable was that provided by cl. 113 of Sch. II, Act IX of 1871, and, therefore, the suit was not barred. Nor were the plaintiffs disentitled to relief by reason of any laches or delay in bringing the suit.

SUIT to obtain delivery of certain shares in the Rangoon Iron Bazar Company. The plaintiffs stated that, in 1860, one

* Regular Appeal, No. 170 of 1875, against a decree of C. J. Wilkinson, Esq., Recorder of Rangoon, dated the 11th of May, 1875.

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J. H. Fowler was possessed of certain immoveable property in Rangoon, known as the Rangoon Iron Bazar, and he agreed with certain other persons to form a limited Company to carry on the business of a bazar, he himself to have one-fourth of the total number of shares. The second paragraph of the plaintiffs' written statement was as follows :—" That as the remaining three fourths of the proposed Company was to be mortgaged to the said J. H. Fowler, and as it was necessary to have seven persons to form the Company, it was arranged to associate six persons only with J. H. Fowler in forming the Company, each of the said persons holding a number of shares in trust for a number of persons, to whom, on the liquidation of the mortgage in favor of J. H. Fowler, and on payment by them of the value of their shares, the shares would be transferred and registered in their names." The Company was started with the issue of 4,000 shares of Rs. 25 each, of which, one Ebrahim Ismailjee Seedat took 1,000. The plaintiffs further alleged that the interest of the said Ebrahim Ismailjee Seedat in the 1,000 shares taken by him did not exceed 160 shares, the rest being held by him in trust, among others, for the plaintiffs, for whom he held 120 shares, which it was agreed should remain in his name until the full value of them should be paid to him by the plaintiffs and until the mortgage to J. H. Fowler should be liquidated, when the 120 shares would be transferred to the plaintiffs and registered in their names; that the plaintiffs, partly in 1861, and partly in 1862, duly paid the said Ebrahim Ismailjee Seedat for the said shares, and the mortgage to J. H. Fowler had been paid off; but the said Ebrahim Ismailjee Seedat did not transfer the said shares to them; that the plaintiffs had sometimes received from Seedat dividends on the said shares; that Seedat died in June 1870, leaving a will, probate of which was shortly afterwards granted to the defendant as the executor named in the said will; that the plaintiffs, accordingly, after making a demand for the said shares, brought this suit to compel the defendant, as the representative of the estate of Seedat to transfer to them the said 120 shares, and to have the said shares registered in the plaintiffs' names in the books of the Company. They also sued for Rs. 435 as their shares of the

dividends on the shares, which had been recovered by the defendant in a suit brought by him against the Company. The plaint was filed on the 11th December, 1874. The defence was, that the shares were a portion of the estate of the said Seedat: that he had not held them in trust for the plaintiffs or other persons, but for himself; and that the plaintiffs were not entitled to any portion of the said shares or the dividends thereon. At the trial an objection was raised, that the suit was barred by limitation. The Recorder of Rangoon, Mr. Wilkinson, found that the plaintiffs' case was made out, and held with reference to an issue as to limitation taken at the trial, that the defendant held the shares as a trustee for the plaintiffs, and that the suit was not barred by limitation. He, accordingly, gave a decree for the plaintiffs. The defendant appealed from his decision to the High Court.

The grounds of appeal were, that the shares were not held by the defendant in trust for the plaintiffs; that the claim was barred by limitation; and that even if it was not barred by limitation, the plaintiffs, by their laches, had disentitled themselves to any relief.

Mr. *Ingram* for the appellant.

Mr. *Evans* and Mr. *Sheill* for the respondents.

The judgment of the Court was delivered by—

GARTH, C.J. (who, after finding on the facts in favor of the plaintiffs, continued):—It is now further contended that, assuming the plaintiffs are entitled to the shares, their present claim is barred by limitation. The plaintiffs (no doubt, foreseeing this difficulty) have attempted to guard against it in their plaint by stating that the shares were held for them by Seedat in trust; and we observe that the learned Recorder has so dealt with the case, and has considered that, upon this ground, the suit is not barred by limitation.

We feel great difficulty in adopting this view; and even if we could look at the transaction in the light of a trust, we do not see that there would be any answer to the plea of limitation.

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If the facts proved by the plaintiffs gave rise to any trust, it would clearly not be "an express trust," or, in other words, "a trust for any specific purpose," within the meaning of s. 10 of the Limitation Act. It could only be one of those implied trusts, which result from particular relations existing between parties not created for any specific purpose, or by any express declaration of, or conveyance to, the persons who undertake the trust (see the notes to s. 2 of Act XIV of 1859, and authorities there cited) (1).

The transaction in this case as described by the plaintiff himself in his evidence is simply a contract, and nothing more. It was agreed, he says, between Seedat and the plaintiffs, that the plaintiffs should take 120 of the 1,000 shares, which were allotted to Seedat; and that when the plaintiffs paid for those shares, Seedat should transfer them into the plaintiffs' names. The plaintiffs then paid Seedat for the shares within a reasonable time, and Seedat was bound to transfer them, and the breach of his agreement to do so would clearly have been good ground for an action for damages in England in a Court of law.

But the plaintiffs had another remedy against Seedat, and that is the one which they seek to enforce in this suit,—*viz.*, to compel him specifically to perform his contract by transferring the shares, and there is no difficulty in the plaintiffs' way as regards limitation, because by clause 113 of the 2nd schedule of the Limitation Act, the three years limitation does not begin to run till "the plaintiff has notice that his right is denied."

The plaintiffs' right in this case, so far as appears, never was denied until immediately before the suit was brought. Indeed, so far as Seedat was concerned, he constantly and invariably admitted it; so that the Statute of Limitation is really no bar.

But then the defendant says, that, in order to entitle the plaintiffs to a specific performance of this contract, they should, according to a well-known rule in equity, have come to the Court as early as they reasonably could. But this is one of that well-known class of cases where one party to a contract

(1) Thomson on Limitation, 1st ed., pp. 233—237.

has been allowed for years by the other party to enjoy all the beneficial interest which the contract could confer, but without being clothed with the title which would perfect his legal rights—as for instance, where a lessee under an agreement for a lease has enjoyed the property for years, as completely as if the lease had actually been granted. Under these circumstances if the intended lessor were to refuse the tenant his lease, or any of the benefits which he had a right to enjoy under it, the tenant might always come into a Court of equity, and compel the landlord to grant the lease. (See per Lord Redesdale in *Crofton* v. *Ormsby* (1), *Clarke* v. *Moore* (2), *Ridgway* v. *Wharton* (3), *per* Lord St. Leonards, and other cases cited in Fry on Specific Performance of Contracts, 322.

In the same way here, the plaintiffs have, from the time when they paid these shares, enjoyed the beneficial interest in them; and they never had occasion to insist upon their legal title to the shares being completed by transfer, until their title to them was denied by the defendant.

We, therefore, consider that, in the result the decision of the learned Recorder was perfectly just, and we, accordingly, dismiss this appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

ABIDUNNISSA KHATOON (DEFENDANT) *v.* AMIRUNNISSA KHATOON (PLAINTIFF).

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24, 25, 28.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Res judicata—Execution Proceedings—Act VIII of 1859, *ss.* 102, 103, & 208—*Act XXIII of* 1861, *s.* 11.

The questions which, under s. 11, Act XXIII of 1861, may be determined by a Court executing a decree, must be between parties to the suit in which the decree was passed, and must relate to the execution of the decree. A per-

* *Present:*—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 2 Sch. & Lef., 583, at p. 604. (2) 1 Jon. & Lat., 723.
(3) 6 H. L. C., 238, at p. 292.

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son who was not on the record when the decree was made, does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is, consequently, not one which the Court executing the decree is competent to entertain. A declaration by a Court in execution proceedings, that a person not a party to the suit applying for execution is legitimate, since it is made without jurisdiction, cannot, under s. 2, Act VIII of 1859, be pleaded as a bar to a regular suit in which it is sought to establish the illegitimacy of the applicant.

Ss. 102 and 103 Act VIII of 1859 relate only to proceedings prior to decree, and not to proceedings in execution.

S. 208 of the same Act does not apply where the person seeking to execute is not a transferee from the original decree-holder either by assignment or operation of law. The section does not apply to cases where the right to an equitable interest in a decree is seriously contested; and was not intended to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir.

Since proceedings under s. 208, Act VIII of 1859, are by s. 364 of the Act, not liable to appeal, a suit would, probably, lie to reverse an order passed therein.

THIS appeal was preferred from a decision of a Division Bench of the Calcutta High Court, Couch, C.J., and Glover, J. (1), dated the 26th July, 1873, affirming a decision of the Subordinate Judge of Dacca, dated the 29th September, 1871.

The suit was brought to set aside certain proceedings taken by the defendant Abidunnissa, in execution of a decree which she had obtained against the plaintiff Amirunnissa, and for a declaration that a child named Wajed Ali, who had in these proceedings been declared to be the posthumous son of Abidunnissa's husband Wahed Ali, was not the son of Wahed Ali. The principal question for determination was, whether such a suit could be maintained. Both the Lower Courts held that the suit might be maintained, and found as a fact that Wajed was not the son of Wahed.

The material facts of the case, and the nature of the previous proceedings out of which it arose, are fully set forth in their Lordships' judgment.

Mr. *Doyne*, who appeared for the appellant Abidunnissa, contended, that the question as to Wajed Ali's legitimacy had been

(1) 20 W. R., 305.

tried and determined in the execution proceedings by a Court of competent jurisdiction, and could not, under the provisions of s. 2, Act VIII of 1859, be re-opened in the present suit. He cited the following cases: *Soorjomonee Dayee* v. *Suddanund Mahapatter* (1), *Chowdhry Wahed Ali* v. *Mussamut Jumaee* (2), *Aga Syed Abdool Hoossain* v. *Lenaine and Snadden* (3), *Rughunundun Rain* v. *Sumessar Panday* (4), and *Hurrolal Doss* v. *Soojawut Ali* (5).

Mr. *Leith*, Q. C., and Mr. *C. W. Arathoon* for the respondent were not called upon.

The judgment of their Lordships was delivered by

SIR R. P. COLLIER.—The facts necessary to the understanding of the question which arises in this appeal may be thus shortly stated:

Wahed Ali brought a suit against his father Abdool Ali, to recover possession of a considerable quantity of landed property, and it may be enough for the present purpose to describe the subject of contention between them thus: The father had executed certain hibbanamahs in favor of his son, when that son was an infant: it was alleged on the part of the father that the son had, subsequently, executed certain ikrarnamahs, whereby he divested himself of the benefit which he derived under the previous hibbanamahs. The Court of first instance dismissed the suit of the son, with the exception of that part which related to some property which he derived from his mother, and about which no question arose. Upon that, Wahed appealed to the High Court. Pending the appeal, Wahed died; and thereupon the High Court, as it appears to their Lordships under the powers given them by s. 103 of Act VIII of 1859, substituted his widow Abidunnissa for Wahed for the purpose of prosecuting the appeal. The appeal was prosecuted; the High Court found the ikrarnamahs to have been invalid, and reversed

(1) 12 B. L. R., 304.
(2) 11 B. L. R., 149.
(3) 13 Moore's I. A., 69.
(4) 13 B. L. R., 489.
(5) 8 W. R., 197.

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the decision of the Court below. The Court observe that, since the death of Wahed, "disputes have arisen, and litigation is now pending, concerning his proper legal representative; and for the purpose of prosecuting this appeal we have admitted his widow Mussamut Abidunnissa Khatoon to be his legal representative." At the conclusion of the judgment they thus express themselves: "The decree of the Court below is reversed with costs. Confining ourselves to the matters in issue in the present suit, our decree will proceed on the basis of the validity of the three deeds of gift, and the invalidity of the later documents. We shall declare that Moulvi Wahed Ali was in his lifetime, and that those who are now by law his heirs and representatives are, entitled to a decree for setting aside the documents relied upon by the respondents, and for the recovery of the property sued for." It is to be observed that the decree drawn up in pursuance of this judgment does not conform to that portion of the judgment in which it is said that the representatives of Wahed are entitled to a decree for the recovery of the property sued for. The decree is in these terms:—"It is declared that the several ikrarnamahs and miras pottahs, dated respectively the 29th Falgoon, 1259, 16th Aughran, 1263, 6th Jeyt, 1264, and the 15th Aughran, 1263, were of no effect and void against Moulvi Wahed Ali in his lifetime, and are void against his lawful representatives. And it is further ordered and decreed that the defendants, respondents, who appeared in this appeal, do pay to the plaintiffs, appellants, the sum of Rs. 3,000." So, in fact, all that could be executed under this decree is the order for costs, the rest of the decree being declaratory only.

It has been argued, however, that the decree ought to be taken to be in conformity with the judgment. Their Lordships are by no means satisfied that this decree *improvide emanavit.* If it were necessary, they would be disposed to take it as it stands, and to declare that the rights of the parties were determined by it. But, in the view which they take of the case, it is not necessary to decide this point; and it may be assumed for argument's sake that the decree is in conformity with the latter words of the judgment which have been read.

An appeal was preferred from this judgment to Her Majesty

in Council, and in 1875 the judgment was reversed (1). In the meantime, however, pending the appeal, certain execution proceedings were taken. The widow Abidunnissa applied for execution on behalf of herself, and also, in a different character, as guardian of an infant son, Wajed Ali, whom she alleged to have been born to her husband after her husband's death. The legitimacy of this child was disputed by Abdool Ali. Certain other parties also applied for execution, Messrs. Wise and Dunne; but as nothing appears to turn on the proceedings taken by them, no further mention will be made of them.

The Judge of Dacca, before whom the case originally came, appears to have held that he had no jurisdiction in a mere execution proceeding to determine such a question as the legitimacy or the illegitimacy of Wajed Ali, the son whom the widow had put forward as being legitimately born to Wahed. Unfortunately, we have not the original judgment of the Judge of Dacca before us. But we come to the conclusion that the Judge so decided, from the first order of the High Court on remand, and what proceeded from the Judge upon the remand. The High Court, in remanding the case, made these observations: "The Lower Court has assigned no good reason whatever for not entertaining and disposing of the application for execution made in this case. Under ss. 102 and 103, and s. 208 of Act VIII of 1859, the case may, so far as anything has been shown to us to the contrary, be perfectly well disposed of without a separate regular suit." And thereupon they remanded the case to be disposed of by the Judge of Dacca, and directed him to determine the question of the legitimacy of Wajed Ali. After a second remand, this question was heard and decided by the Judge of Dacca, and decided against the widow, the Judge holding that Wajed Ali was supposititious. Subsequently, on appeal, the same matter came before the Court; and two Judges of the High Court reversed the judgment of the Judge of Dacca, and held that Wajed Ali was the legitimate son of Wahed. They refer to the proceedings in this manner: They state: "The question that is now before us is,

(1) See 15 B. L. R., 67; S. C., L. R., 2 In. App., 87.

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whether the person who goes by the name of Wajed Ali is or is not a posthumous son of the said Wahed Ali; and whether, therefore, one Abidunnissa, who is admittedly the guardian of Wajed Ali, if there is such a person in reality, is entitled to execute the said decree partly in her own right and partly as mother and guardian of the said Wajed Ali,"—and they decree,—"that Abidunnissa be declared entitled to execute the whole of her decree against the judgment-debtor before us,"—that is, in her two capacities, partly for herself and partly in her new capacity of guardian of Wajed Ali. It appears to their Lordships, that she, in her character of guardian of Wajed Ali, became a new party in these proceedings, just to the same extent that Wajed Ali would have become himself, if, after he had come of age, he had appeared by his attorney.

Upon this, Abdool Ali having died, his widow Amirunnissa instituted the present suit for the purpose of setting aside the last judgment which has been referred to mainly upon two grounds: in the first place, that in an execution proceeding it was not competent to the Court to entertain such a question as the legitimacy of Wajed; and secondly, upon the merits. On the other hand, Abidunnissa contends that the suit is not maintainable, because the very question has been decided between the same parties in a previous suit by a Court of competent jurisdiction. In other words, she pleads *res judicata*, and she also joins issue upon the merits.

As far as the merits are concerned, both Courts have found that Wajed was not the son of Wahed; and the sole question before their Lordships is this, whether this question is *res judicata* or not. There is no doubt that, in the execution proceeding which has been referred to, the very same issue was tried between the same parties. The sole question is, whether the Court had jurisdiction in such a proceeding to try it.

Some attempt was made to establish that Abdool had originally consented to the exercise of this jurisdiction, but their Lordships cannot assume this. The inference appears to them the other way. They have not the record of the first proceeding before the Judge of Dacca; but the Judge of Dacca decided that he had not jurisdiction to determine the question in that

suit. It appears to their Lordships that it ought not to be assumed that he would have come to that conclusion unless the objection had been raised; the assumption would be the other way. They cannot, therefore, assume consent even if consent would have given jurisdiction in such a case.

The question, whether the jurisdiction existed or not, depends entirely upon the construction of certain sections in two Acts which have been referred to; the first being Act VIII of 1859, and the second, Act XXIII of 1861. The sections of the first Act relied upon by the Court in their first remand, are ss. 102, 103, and 208. The first sections, 102 and 103, relate to the substitution, in the case of the death of a sole plaintiff or surviving plaintiff, of a legal representative of such plaintiff. The 102nd section refers to cases where there is no dispute. S. 103 is the section which, as before observed, was acted upon in this case, when Abidunnissa was allowed to prosecute the suit, and is to this effect: "If any dispute arise as to who is the legal representative of a deceased plaintiff, it shall be competent to the Court either to stay the suit until the fact has been determined in another suit, or to decide at or before the hearing of the suit who shall be admitted to be such legal representative for the purpose of prosecuting the suit." Under the terms of this section, it not being decided by the Court that Abidunnissa was the legal representative of her husband, she was admitted "for the purpose of prosecuting the suit;" those being the very words used by the Court in their judgment. This section manifestly cannot apply to the case of Wajed, because this section, which comes under the heading of "proceeding before judgment," has reference only to a state of things existing before the hearing of the suit or at the hearing of the suit; and before and at the hearing of the suit there was no suggestion whatever that Wajed had any interest whatever in it.

Then we come to s. 208, which, undoubtedly, is a section relating to proceedings for execution, and after judgment and decree. It is to this effect:—"If a decree shall be transferred by assignment or by operation of law from the original decree-holder to any other person, application for the execution of the decree may be made by the person to whom it shall

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have been so transferred, or his pleader; and if the Court shall think proper to grant such application, the decree may be executed in the same manner as if the application were made by the original decree-holder." It appears to their Lordships, in the first place, that, assuming Wajed to have the interest asserted, the decree was not, in the terms of this section, transferred to him, either by assignment, which is not pretended, or by operation of law, from the original decree-holder. No incident had occurred on which the law could operate to transfer any estate from his mother to him. There had been no death; there had been no devolution; there had been no succession. His mother retained what right she had; that right was not transferred to him; if he had a right, it was derived from his father; it appears to their Lordships, therefore, that he is not a transferee of a decree within the terms of this section.

Their Lordships have further to observe, that they agree with the Chief Justice in the view which he expressed,—that this was not a section intended to apply to cases where a serious contest arose with respect to the rights of persons to an equitable interest in a decree. It was not intended to enable them to try an important question, such as the legitimacy or illegitimacy of an heir. They are further fortified in this view by the consideration that, under s. 364 of this Act, no appeal would lie from any judgment or decision given in a proceeding under s. 208; it appears difficult to suppose that such an important question as this should be triable without appeal. Therefore, in their Lordships' view, agreeing with that of the Chief Justice, s. 208 does not apply. Even if it did apply, it would appear to their Lordships that, inasmuch as proceedings under it are not subject to appeal, probably a suit would lie for the purpose of reversing an order made in pursuance of it.

Act VIII then being disposed of, we next come to the second Act, Act XXIII of 1861. The sole section relied upon has been the 11th, which is in these terms: "All questions regarding the amount of any mesne profits, which, by the terms of the decree, may have been reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may be payable in respect of the subject-matter of a suit, between the

date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree, or the like, and any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing decree, and not by separate suits, and the order passed by the Court shall be open to appeal." Their Lordships quite accede to the view of the learned counsel for the appellant, that this section was intended to enable questions to be tried in execution cases which could not have been so tried before, and to provide, as might have been expected, an appeal from decisions in such trials; but the question narrows itself to this, whether the present case comes under these words: "any other questions arising between the parties to the suit in which the decree was passed, and relating to the execution of the decree." There must be two conditions to give the Court jurisdiction. The question must be between parties to the suit, and must relate to the execution of the decree.

Their Lordships are of opinion that it would be straining the words of this section beyond any legitimate construction which could be put upon them, to apply them to the present case. In their judgment, Wajed Ali appearing by his mother (and, as before observed, it would have been the same thing if he had been of age and had appeared in the usual way by his attorney or mooktear,) in no proper sense of the word was a party to this suit. No rights of Wajed Ali were determined or considered in the suit. He was not on the record when judgment was given, nor when the decree was made. He subsequently applied for execution of the decree; but it appears to their Lordships impossible to say that a person by merely applying for execution of the decree thereby constitutes himself a party to the suit. Their Lordships are, therefore, of opinion that this section does not apply.

Under these circumstances, their Lordships have come to the conclusion that the issue which has been referred to in the case was not *res judicata* by a competent Court in a competent proceeding; and for this reason they will humbly advise Her

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Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the appellant: Messrs. *Lawford* and *Waterhouse.*

Agent for the respondent: Mr. *T. L. Wilson.*

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1876 *Dec.* 11. 1877 *Feb.* 22.

DHONESSUR KOOER (DECREE-HOLDER) *v.* ROY GOODER SAHOY (JUDGMENT-DEBTOR).*

Limitation Act (IX of 1871), *Sched. II, Art.* 167—*Application for Execution of Decree—Suit.*

Per GARTH, C. J., and MARKBY and AINSLIE, JJ. (KEMP and MACPHERSON, JJ., dissenting).—The periods of limitation prescribed in Sched. II of Act IX of 1871 are to be computed subject to the provisions contained in the body of the Act.

An application made on the 8th January, 1875, to execute a decree, the last preceding application having been made on the 8th January, 1872, was held to be within the time allowed by Art. 167, Sched. II, Act IX of 1871.

Per Curiam.—The word 'suit,' as used in the Act, does not include 'applications.'

ON the 8th January, 1872, Dhonessur Kooer applied for execution of a decree against Roy Gooder Sahoy, but took no further steps in the matter till the 8th January, 1875, when she made a fresh application to execute the decree. Both the Lower Courts held that this application was barred by the Limitation Act. The decree-holder appealed to the High Court, when, in consequence of the opinion expressed by Jackson, J., in *Banee*

* Miscellaneous Special Appeal, No. 109, of 1876, against an order of E. Drummond, Esq., Judge of Zilla Sarun, dated the 11th February, 1876, affirming an order of S. W. DaCosta, Esq., Subordinate Judge of that district, dated the 28th of May, 1875.

Kant Ghose v. *Haran Kisto Ghose* (1), being in conflict with the opinion of McDonell, J., in the same case, and with the opinion of Birch and McDonell, JJ., in *Raja Promotho Nath Roy Bahadoor* v. *Watson* (2), Kemp and Birch, JJ., who heard the appeal, referred the following questions for the opinion of a Full Bench:—

1. Whether the periods of limitation prescribed in Act IX of 1871, Sched. II, Division 3, are to be computed subject to the provisions contained in the body of the Act?

2. If the provisions of the Act apply to Sched. II, Division 3, is the word 'suit' to be interpreted so as to comprehend 'application' in execution of decrees?

Baboo *Bhoyrub Chunder Banerjee* (with him Baboo *Bama Churn Banerjee*) for the appellant.—S. 13 of the Limitation Act provides that, "in computing the period of limitation prescribed for any suit, the day on which the right to sue accrued shall be excluded." It is submitted that an application for the execution of a decree is a suit within the meaning of that section. [AINSLIE, J.—This Court has ruled more than once that the word 'suit' in s. 1, cl. *a* does not include applications.] Yes, that must be admitted; see *Rohini Nundun Mitter* v. *Bhogoban Chunder Roy* (3) and *Rughoo Nath Doss* v. *Shiromonee Pat Mohadebee* (4); but in *Raja Promotho Nath Roy* v. *Watson* (2), Birch and McDonell, JJ., following the decision in *Hurro Chunder Roy Chowdhry* v. *Sooradhonee Debia* (5), held, that the word 'suit' in s. 14 of the Act does include applications for the execution of decrees. In the case last cited, Peacock, C.J., says, with respect to proceedings in execution "the word 'suit' does not necessarily mean an action . . . . Any proceeding in a Court of Justice to enforce a demand is a 'suit;' and this view was adopted by Stuart, C.J., in opposition to the rest of the Court, in the recent case of *Jiwan Singh* v. *Sarnam Singh* (6). Wherever a proceeding is not strictly a proceeding to enforce a demand, special provision seems to have been made

(1) 24 W. R., 405.
(2) *Id.*, 303.
(3) 14 B. L. R., 144, note.
(4) 24 W. R., 20.
(5) B. L. R., Sup. Vol., 985.
(6) I. L. R., 1 All., 97.

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for it. Thus s. 13 specially provides for certain applications, and s. 15, explanation 2, enacts that a plaintiff resisting an appeal presented, on the ground of want of jurisdiction, shall be deemed to be prosecuting a suit within the meaning of that section. The same larger sense appears to be attached to the word 'suit' in s. 7, which deals with the case of persons under legal disability. But, apart from the applicability of s. 13 to proceedings in execution, it is submitted that the appellant's application was made within the period allowed by art. 167 of the 2nd sched. The heading of the 3rd column, "time when period begins to run," is somewhat ambiguous; but the ambiguity is removed if for 'when we read 'from which' or 'from when.' The corresponding expression in the body of the Act is 'from the time when;' see ss. 18, 19, 20, 21, and 25. Had the word 'from' been used, the day on which the preceding application was made must have been excluded—Act I of 1868, s. 3, cl. 2. [GARTH, C. J.—Unless the day be excluded, time would begin to run before the decree was passed.] Yes, instead of three years there would be only three years minus one day, and supposing the time specified in the 3rd column had been one day, the applicant would, in fact, have had no time at all. The Privy Council have held, on general principles, that the six months allowed for appeals to Her Majesty in Council must be reckoned exclusive of the day on which the decree appealed from was pronounced—*In the matter of the Petition of Ramanoogra Narain* (1).

Baboo *Kally Kissen Sein* for the respondent.—The 2nd Sched. of Act IX of 1871 provides periods of limitation for suits, appeals, and applications; and the heading of the 3rd column is the same, whether suits or applications are referred to. In the case of suits, however, s. 13 expressly enacts that the day on which the cause of action arose shall be excluded. This would be wholly unnecessary if the word 'when' in the heading of the third column is to be read as 'time from when.' Throughout the Act the distinction between 'suits,' 'appeals,' and 'applications' is carefully marked, and

(1) 13 W. R., P. C., 17.

the limitation of the provisions with respect of s. 13 to suits *eo nomine* shows that the Legislature did not intend the section to have the wide application now contended for.

Baboo *Bhoyrub Chunder Banerjee* in reply.

Cur. adv. vult.

GARTH, C. J.—The judgment which I am about to pronounce is concurred in by Markby and Ainslie, JJ.

1. We are of opinion that the periods of limitation prescribed in the 2nd Sched. of the Act of 1871 are to be computed subject to the provisions contained in the body of the Act. The schedules form a part of the Act, and must be read together with it for all purposes of construction.

2. We think that the word 'suits' in the Act of 1871 was not intended to include 'applications.' In the Act of 1859 the word might have had a more extended meaning; but in the Act of 1871 a distinction seems to have been carefully drawn between 'suits,' 'appeals,' and 'applications;' each of these subjects being separately dealt with, and in different divisions of the schedule.

3. It appears to us, however, that, in the special appeal which is the subject of this reference, the Courts below were wrong in refusing the application of the decree-holder upon the ground that she was barred by lapse of time. It was obviously the intention of the Act to give the decree-holder three years, and not less than three years, from the time of his former application, for the purpose of making a fresh one. And the only way of carrying out that intention, and putting a reasonable construction on the Act, is by excluding the day upon which the former application was made from the computation of the three years. It could hardly have been the intention of the Legislature that the three years' limitation should begin to run before the first application had been made; and yet this would be the necessary consequence of the construction which has been adopted by the Courts below.

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It is perfectly true that the provisions of s. 13 do appear to give some colour to that construction; and it is impossible to construe the words in question in either way without some apparent inconsistency; but by reading the phrase at the head of the schedule, 'time when the period begins to run' as meaning 'time from which the period begins to run,' we think we should be doing no real violence to the language of the Act, and that we should be, undoubtedly, carrying out the intention of the Legislature.

In our opinion, therefore, the application was made by the decree-holder in due time: the judgments of both the Lower Courts should be reversed; and the case should be remitted to the Court of first instance to be dealt with upon its merits.

The appellant will be entitled to his costs in this Court as well as in the Courts below.

KEMP, J. (MACPHERSON, J., concurring).—We agree in thinking that an 'application' is not a 'suit' within the meaning of the Limitation Act. But we are unable to say that we concur in the rest of the judgment just delivered. We think, nevertheless, that the result arrived at is probably in accordance with the real intention of the Legislature.

PRIVY COUNCIL.

KONWAR DOORGANATH ROY (PLAINTIFF) *v.* RAM CHUNDER SEN AND OTHERS (DEFENDANTS).

P. C.*
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Nov. 28, 29, & 30.

[On Appeal from the High Court of Judicature at Fort William in Bengal.]

Hindu Law—Endowment—Powers of Shebait—Alienation—Notice to Purchaser.

A plaintiff who seeks to set aside an alienation of lands on the ground that they are debutter, *i. e.*, dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mehal have been applied for a considerable period to the worship of an idol, is not sufficient proof that the mehal is debutter.

The *shebait*, or manager, of a debutter estate has authority where the purposes of the endowment require it to raise money by alienating a part of the estate, his position being analogous to that of a manager of an infant heir under the Hindu law. The cases of *Hunoomanpersad Panday* v. *Mussamut Babooee Munraj Koonweree* (1) and *Prosunno Kumari Debya* v. *Golab Chand Baboo* (2) referred to and approved.

The written conveyance of certain lands stated them to be debutter, and to be alienated to raise money to repair the temple of the idol. In a suit to set aside the alienation, it appeared that, at the time of the transaction, the temple required repairs, but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed, *held*, that the sale was valid.

Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced.

THIS was an appeal from two decrees of a Division Bench of the Calcutta High Court, dated the 21st April, 1874, reversing a decree of the Officiating Subordinate Judge of Zillah Moorshedabad, dated the 6th January, 1873.

* *Present*:—SIR J. W. COLVILE, SIR B. PEACOCK, SIR M. E. SMITH, and SIR R. P. COLLIER.

(1) 6 Moore's I. A., 393. (2) 14 B. L. R., 450; S.C., L.R., 2 Ind. Ap., 145.

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The suit in which these decrees were pronounced was brought by the appellant, Konwar Doorganath Roy, as plaintiff, to recover from the defendants, the respondents on the appeal, khas possession of a mehal, named Gopeejan or Goaljan, which the plaintiff contended was debutter, and belonged to him as shebait of an idol named Radha Mohun Thakoor, to whose worship it had been dedicated by his, the plaintiff's, ancestor, Rajah Mahanund Roy, but which he alleged had been unlawfully alienated by his grandmother, Rani Rashmoni, to the persons from whom the defendants derived their title.

Rajah Mahanund Roy, by whom the plaintiff alleged that the idol had been endowed, died in the year 1805, leaving three sons, Ram Krishna, Joy Krishna, and Bijoy Krishna, who became entitled on his death to succeed to his property in equal shares. Ram Krishna died without issue, leaving a widow, Rani Bhagiruthi, as his heir. On the death of Joy Krishna and his wife, without issue, his share passed to Bijoy Krishna, who thus became entitled to two-thirds of the property which had belonged to his father, Rajah Mahanund. Bijoy Krishna died in 1832, without issue. Shortly before his death he executed an anumatipatro, whereby he gave his widow, Rani Rashmoni, a life estate in the whole of his property, with authority to adopt a son. In pursuance of this power, Rani Rashmoni adopted Konwar Krishna Chunder, who died without issue in 1843, leaving in his turn authority to his widow, Rani Prosunnomoyi, to make an adoption. Konwar Doorganath Roy, the present appellant, was adopted by Prosunnomoyi. Rani Rashmoni died in 1870, having retained, up to the time of her death, the possession and management of Bijoy Krishna's estate.

In the year 1834, proceedings were instituted against Rani Rashmoni by Rani Bhagiruthi, the widow of Ram Krishna, to recover her husband's one-third share of the lands, &c., which he had inherited from his father, of which Rashmoni had taken possession. A final order was passed in these proceedings in December, 1841, by which it was, among other things, directed, that Bhagiruthi should receive from Rashmoni, 120 out of the 360 bigas of "the brammottar tarraf of Gopeejan."

Subsequently, in the year 1847, Rashmoni, on payment to

her of a sum of Rs. 1,900, executed a maurasi and mokurari patta of the remaining two-thirds share of Gopeejan, to two persons, named Ram Soondur Sen and Nimai Soondur Roy, at an annual rent of Rs. 325 ; and in the year 1849, by a deed of sale to one Soodha Krishna Sen, she permanently assigned over Rs. 300 annually out of the rent of Rs. 325 payable to her. The terms of these two instruments, in so far as they are material, will be found set forth hereafter in their Lordships' judgment.

In the year 1855, Rani Prosunnomoyi, representing herself as acting as guardian of Konwar Doorganath Roy, and as shebait of the idol Radha Mohun Thakoor, sued to have the above-mentioned instruments set aside; but it was held by the Sudder Court, affirming the decision of the Principal Sudder Ameen of Moorshedabad, that they could not be set aside while Rani Rashmoni lived.

The present suit was brought in 1871, after the death of Rani Rashmoni, with the object of having the instruments executed by her in favour of Ram Soondur Sen and Nimai Soondur Roy, and of Soodha Krishna Sen, set aside; and of recovering the Gopeejan mehal, less the 120 bigas taken by Rani Bhagiruthi, under the order passed in December, 1841.

The defendants, who were the representatives in title of the alienees, raised various pleas. They objected that the plaintiff was not legally adopted; that the suit was barred by limitation; that the property was not in fact debutter, and that the alienations by Rashmoni had been made for just and necessary purposes. In the written statement of some of the defendants, the alienations were said to have been made in order to raise funds to pay the Government revenue of other mehals. By others of the defendants, they were said to have been made for that purpose, and to pay for "repairing the temples of the idols." The Subordinate Judge decided in favour of the plaintiff on all the issues, and gave him a decree for possession of the property claimed. Two separate appeals against this decision, on behalf of different defendants, were heard together by the High Court, who were of opinion that the property had not been proved to be debutter, and held that the alienations were valid. Both

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appeals were, accordingly, decreed against the plaintiff, who then brought the present appeal to Her Majesty in Council.

Mr. *Leith*, Q. C., and Mr. *G. Williamson*, for the appellant.

Mr. *T. H. Cowie*, Q. C., and Mr. *Joseph Graham*, for the respondents.

The following cases were cited in the course of the argument; *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (1); *Juggut Mohinee Dossee* v. *Sookheemonee Dossee* (2); *Prosunno Kumari Debya* v. *Golab Chand Baboo* (3); *Brojosoondery Debya* v. *Ranee Luchmee Konwaree* (4); *Hunooman Persad Panday* v. *Mussamut Babooee Munraj Koonweree* (5).

The facts of the case, and the arguments relied on by the parties, fully appear in their Lordships' judgment, which was delivered by

SIR M. E. SMITH. — This is a suit brought by the appellant Konwar Doorganath Roy to set aside certain alienations of two-thirds of an ancestral mehal called Gopeejan, made by his grandmother Rani Rashmoni, on the ground that the mehal had been dedicated to the worship of an idol Radha Mohun Thakoor. The respondents are the successors of the original grantees, or persons deriving title from them. To show the position of Rashmoni at the time she made the alienations in question, and that she may have acted not merely as the widow and heiress of her deceased husband Roy Bijoy Krishna, an anumati-patra has been put in, which gave her, undoubtedly, special powers. The anumati-patra, or so much of it as is material, is as follows:—"You are my wife. You have no children born to you. I am now very ill in body. I have no hope of life. On my death there will be no one to perform the ancestral deb-kirti (worship of the gods), &c., and offer the jalpinda (funeral cake and libations of water) of

(1) 13 Moore's I. A., 270.

(2) 10 B. L. R., 19; S.C., 14 Moore's I. A., 289; 17 W. R., 41.

(3) 14 B. L. R., 450; S.C., L. R., 2 Ind. Ap., 145.

(4) 15 B. L. R., 176, note; S.C., 20 W. R., 95.

(5) 6 Moore's I. A., 393.

my ancestors. For the observance of all these rites, and of the jalpinda to the ancestors, as well as the preservation of the zemindaris, lakhiraj, debutter, &c., I, in my sound mind, give you permission, on my death, to keep possession of my zemindaris, debutter, &c., recording your own name in the Collectorate sherishta, to remain in enjoyment of the profits, and to defray the expenses of the deb-kirti during your lifetime, and to adopt one or two sons born in the family of true Brahmans. On your death, that adopted son will succeed to all properties; and on the said adopted son attaining his majority, you will, if you should desire it, get his name recorded in the zemindari tahut, and surrender the entire management to him." And then there is this statement: "Now I am a debtor to mahajans (creditors). Some mehals of the zemindari are in mortgage on account of those debts. If there should be no other means of liquidating the debts, you will either sell a small portion of the zemindari or make conditional sale of it, as appears necessary, and liquidate the debts."

Now, undoubtedly, there is a reference to debutter property in this document, but this document itself creates no endowment; and it is necessary for the plaintiff to show *aliunde* that there was an existing endowment in favour of this particular idol to which the word debutter may be referred.

With regard to the position of Rashmoni under the anumatipatra, it would seem that she took a life interest in the properties, and that power was given to her by it to adopt a son. It must, of course, be admitted that this document gave no authority to Rashmoni to alienate the estate; but she had, as the manager of the estate, power, if it were debutter dedicated to the idol, to alienate so much of it as was necessary to keep up the temple and worship of the idol; and if it were secular, to alienate it if it became necessary to do so to preserve the rest of the family estate.

That being her position, she made the two alienations in question. The first is a maurasi mokurari patta, which she granted to two persons, Nimai Soondur Roy and Ram Soondur Sen. This patta describes the estate thus: "Tarraf Wargopjan *alias* Goaljan," which is admitted to be the estate

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Gopeejan, "the patrimonial debutter rent-free land of Bijoy Krishna Roy, my late husband, the boundaries of which are on the east the Ganges," and so on, "is the debutter property of the Sri Sri Iswar Radha Mohun Thakoor of Raninuggur, which is in my possession and enjoyment as shebait of the idol." Then the grantor notices the fact that 120 bigas, or one-third of that mehal, had been decreed to Bhagiruthi Debi, the widow of one of her husband's brothers, Ram Krishna Roy. "With the exception of 120 bigas of mathan land decreed in the suit of Bhagiruthi Debi, widow of the late Ram Krishna Roy,' the eldest brother of my late husband, the remaining lakhiraj lands," and so on. The document proceeds: "Now the temple of the Sri Sri Iswar being broken, and necessary repairs and various other things being requisite for the service of the idol, I have given you a settlement as a maurasi mokurari talook of the entire lakhiraj zemindari rights in the said mauza at a fixed jamma of Rs. 325, for a consideration of Co.'s Rs. 1,900, which I have received in cash and in full weight." That is the substance of the document.

The other document is executed by Rashmoni in favour of Soondur Krishna Sen, one of the family of one of the grantees of the mokurari. It is a bill of sale of the proprietary right to the extent of Rs. 300 of the mokurari rent, and it says: "Deducting the land of the said decree, the remainder is my own right," referring to the decree in favour of Bhagiruthi, "a maurasi and mokurari talook, representing the entire right in the lakhiraj zemindari, was given in settlement of Nimai Soondur Roy, inhabitant of Naharpara, and Ram Soondur Sen, inhabitant of Koridha, at an annual jamma of Rs. 325, exclusive of collection charges, on the 18th of Cheyt of the year 1254. They hold possession of the property as a maurasi and mokurari talook, and are paying the fixed jamma. I, agreeably to the instructions of my late husband, have commenced building the temples of Sri Sri Iswar Radha Mohun Thakoor Jeo, and others, but being in want of means, am unable to carry out the instructions of my husband. I have voluntarily, in my sound senses, sold to you for 'Co.'s Rs. 1,700 my own entire share of 14 annas, 15 gandas, 1 cowri,

2 kags, out of 16 annas of the said maurasi mokurari mauza, the jamma of which is Rs. 300."

Mr. Leith, on the part of the appellant, undertook to satisfy their Lordships that this mehal of Gopeejan had been dedicated to the idol, and, therefore, it was incompetent for Rashmoni to make these alienations.

Now, apart from the admissions contained in the maurasi patta and the bill of sale themselves, their Lordships are clearly of opinion, in accordance with the view of the High Court, that the evidence fails to show that this land was so dedicated.

Mr. Leith, opened his case by an endeavour to show a deed of foundation or endowment of the idol by the gift of this estate from Rajah Mahanund, who was the father of Rajah Bijoy Krishna, the husband of Rani Rashmoni.

It may be convenient to state here the position of the family so far as it is material to the present case. Rajah Mahanund, who, it is said, was the founder of this endowment, died in 1805 or 1806. He had a son Bijoy, who left a widow, Rashmoni, giving her the anumati-patra, to which reference has already been made. She, it appeared, lived until February, 1870. She exercised the power of adoption given to her by her husband, and adopted Krishna Chunder, who married Rani Prosunnomoyi Debi. He also had no son; and he also gave to his wife a power of adoption, which she exercised in favour of the appellant, Konwar Doorganath Roy. It appears that Rajah Bijoy had two brothers, and one of them married a lady of the name of Bhagiruthi Debi, who, in the year 1855, brought a suit against Rashmoni, and obtained the decree already mentioned, to recover one-third of the mehal of Gopeejan.

If the deed of endowment from Rajah Mahanund were satisfactorily proved, and it were an endowment which dedicated this mehal to the service and worship of a particular idol, then, though the idol were a family idol, the property would be impressed with a trust in favour of it. Where the temple is a public temple, the dedication may be such that the family itself could not put an end to it; but in the case of a family idol, the consensus of the whole family might give the estate another direction. No question, however, of that kind arises in the present case.

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The proof of this deed of endowment, which is said to have been executed by the Rajah Mahanund, when it comes to be investigated, is of the most unsatisfactory description. First, the existence of such a deed at all is not clearly made out; and so far as the document, the rubokari of a former suit, is relied upon as showing its contents, the description there given is so obscure that it is impossible to say whether the whole of the mehal of Gopeejan was included in the supposed dedication or not.

(After going into the evidence in proof of the deed his Lordship continued)—

In that state of things their Lordships think it is very doubtful whether secondary evidence of the deed should be permitted at all; but if it be allowed, then they are to judge of the effect of the secondary evidence, and to determine in the first place whether it satisfies them that such a deed really existed at all. Now, from the circumstances which have been already pointed out, they are by no means satisfied that such a deed ever did exist. That a document of the kind was put forward by Bhuttacharjya on behalf of Rashmoni in the creditor's suit is proved by the rubokari; but whether it was a genuine deed, or one put forward to meet the purposes of that suit, is left in doubt and obscurity.

But, assuming that a deed did exist, and that it was to the effect which is referred to in the rubokari, their Lordships find that the question what property was included in it is left in considerable obscurity. (His Lordship then went through the terms of the rubokari and continued.)

Therefore, in addition to the insufficiency of the proof to satisfy their Lordships with reasonable certainty that such a document really existed, there is so much obscurity in the language that it is impossible to say that if it did exist it included the whole of this mehal.

If that document is out of the case, there is very slight evidence indeed of any such endowment. The case then rests, independently of the admissions in the deeds, upon the evidence of the dewan and muktear, and one or two other witnesses, that the rents of this mehal, Gopeejan, were applied to the worship of

this idol. But that evidence is extremely vague and extremely loose. The muktear says in several places, that the rents were applied to the worship of the idols, and it is plain from all the evidence in the case that there were several idols belonging to this family, and no doubt the rents of some of the family mehals were applied to sustain their temples and worship. But supposing it to be taken that the rents of this mehal were applied during the period that the witnesses speak of to the worship of the idol Radha Mohun, that fact is by no means sufficient to establish the onus which lies upon a party who sets up the case that property has been inalienably conferred upon an idol to sustain its worship. Very strong and clear evidence of such an endowment ought to exist. In the present case there is no proof that priests were appointed. If any had been appointed, they might have been called. There is no production of accounts showing that the rents were separately collected and applied for the worship of this idol. For anything that appears the rents may have gone into the general body of the accounts relating to the estates of this family, and there is really no document whatever upon which the finger can be placed to show that an endowment was made, other than that rubokari to which reference has already been made.

Besides the weakness of the proof of endowment on the part of the plaintiff, strong presumptions that there was none arise from other facts and circumstances in the case. It is said that the application of the rents of this particular mehal for a certain period to this idol is some evidence that the family were aware that the rents were properly and by right so to be devoted; but if the conduct of the family is to be regarded, there is, on the other side, the strongest indication, from what occurred in the suit brought by Bhagiruthi, the widow of the eldest brother of Bijoy, that the family understood that there was no such endowment. That suit was brought by Bhagiruthi to recover from Rashmoni one-third of the mehal in question. She did not claim it as property to which she was entitled as joint shebait, but she claimed it as one-third of the family estate to which she, as widow of one of the brothers, was entitled. That is her claim. Rashmoni does not set up as a defence that the

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mehal was debutter property devoted to this idol, that she was the shebait, and entitled, at all events, to the possession and the management of it; she sets up no case of that sort, but allows a decree to be passed against her in favour of Bhagiruthi to recover one-third of the mehal, and in that decree the property is described, not as debutter, but as brammottar property.

Now if this mehal had been really dedicated to the idol, it would no longer have been a partible estate. Rashmoni would, as shebait, have been entitled to the possession of it and to the management and disposition of the revenues; and all that Bhagiruthi could have been entitled to would have been a share in the surplus revenues, if there should have been a surplus, after due provision had been made for the worship of the idol.

Therefore, there is not only weakness of proof on the part of the plaintiff, but a very strong presumption, arising from the conduct of the parties in the suit in question, that this was not debutter property such as it is alleged to be on the part of the plaintiff.

Supposing the case had rested there, their Lordships feel no doubt whatever that the judgment of the High Court was perfectly right. But it does not rest there, and it now becomes material to consider the terms of the maurasi patta and of the bill of sale. Mr. Leith, in his reply, very properly relied on them as being the strength of his case. If they are to be used as evidence only, then this evidence must be weighed with all the other evidence in the case, and so weighing it, their Lordships are not satisfied that it turns the scale in favour of this property being debutter. But the statements in these deeds are relied upon by the plaintiff as an admission which estops the parties to them from asserting that these lands were not debutter. But if the statements are relied on in this way, they must be taken as a whole; and so taking them, it would appear that, granting the lands were debutter, the sale would be justifiable, the statement being that the sale was made for the purpose of the repair of the temple of the idol. The mokurari was granted, according to the statement, because the temple was out of repair, and money was wanted to restore it. The sale of part

of the mokurari rent was granted in consideration of money stated to be required for the completion of the temple, which it was stated was already in course of erection. If, therefore, the statements in these deeds are taken as a whole, the alienations they contain were justifiable, assuming the property to have been debutter land.

What, then, is the plaintiff's position? These deeds are thirty years old, and he comes into Court to set them aside upon the ground that they were collusive; and if he could have shown that the representation, although made, was not believed by the grantees, and that they colluded with Rashmoni to put a pretended consideration on the face of the deeds, he might have succeeded. But there is no evidence whatever of any such collusion. There is nothing to show that the original grantees did not believe the statements appearing upon the face of the deeds; indeed, if they had made inquiry, they would have found that the fact agreed with the statement, for it appears upon the evidence and upon the finding of the Subordinate Judge that the temples were out of repair. If, then, the temples were out of repair, and if Rashmoni offered this mokurari patta to raise money for the purpose of doing the repairs that the temple required, the purchaser, who *bonâ fide* took it upon that representation, would clearly be entitled to keep his purchase. It may be that Rashmoni did not intend to apply the money to the purpose for which she professed to require it. It may be that she always intended to apply it to the payment of the Government revenue, as it appears that in point of fact she did. But unless the purchaser was aware at the time he made the purchase that that was her intention, and that the statement in the deed was a colourable one, he could not be injured by her concealment of her true object, or by her having subsequently applied the money to a different purpose. She, as the manager of this estate, had the same right, or an analogous right to that of the manager of an infant heir; and that was defined in very plain language in the case of *Hunooman Persaud Panday* v. *Mussamut Babooee Munraj Koonweree* (1): "The power of the manager for an infant

(1) 6 Moore's I. A., 393, see at p. 423.

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heir to charge an estate not his own is, under the Hindu law, a limited and a qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. But where, in the particular instance, the charge is one that a prudent owner would make in order to benefit the estate, the *bonâ fide* lender is not affected by the precedent mismanagement of the estate; the actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, in the particular instance, is the thing to be regarded. But, of course, if that danger arises, or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favour against the heir, grounded on a necessity which his wrong has helped to cause. Therefore, the lender in this case, unless he is shown to have acted *malâ fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt. Their Lordships think that the lender is bound to inquire into the necessities for the loan, and to satisfy himself, as much as he can, with reference to the parties with whom he is dealing, that the manager is acting in the particular instance for the benefit of the estate. But they think that if he does so inquire, and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity is not a condition precedent to the validity of his charge; and they do not think that, under such circumstances, he is bound to see to the application of the money." That passage was adopted in a very late case before this board, *Prosunno Kumari Debya* v. *Golab Chand Baboo* (1). In that case a shebait had incurred debts, and mortgaged the property of the idol for the purpose of the necessary sustentation of the worship of the idol;—and this tribunal held that the position of the shebait was analogous to that of a manager of an infant, and that he had the same authority, which in both cases arises from the necessity of the case, to raise money for the benefit of the estate. Here it cannot be said the grant of a mokurari patta was an improvident way of raising money, if it were necessary to do it at all. It still left a rent for the

(1) 14 B. L. R., 450, at p. 469; S. C., L. R., 2 In. App., 145, at p. 151.

sustentation of the idol; and if the transaction be *bonâ fide*, the subsequent sale of part of the rent was justified by the imperious necessity of finishing the temple which had been commenced.

On these grounds, therefore, their Lordships think that, assuming the purchasers to be bound by the representations in the deeds, there being no evidence that they did not put entire faith in them, the grants cannot now be impeached.

It was objected on the part of the plaintiff that this answer had not been put forward by the defendants, and, undoubtedly, they have relied more strongly upon the defence that the land was not debutter land at all. But several paragraphs in the written statements were pointed out, in which the case was made. It is no doubt alleged in these paragraphs that the money was wanted for two purposes—for the sustentation of the worship of the idol and the repairs of the temple, and also for the payment of Government revenue. But their Lordships think that there is enough in those statements to allow of the present answer to the estoppel being made on the part of the respondents, and it is to be observed that in the suit brought by Prosonnomoyi during the lifetime of Rashmoni, in which the original grantee, Sen, was a party, he there set up the defence in a perfectly correct form,—namely, that the representation made was that the money was wanted for the repairs of the temple, and that he advanced it for that purpose.

But assuming the facts to be as alleged in the statement of defence, their Lordships are still of opinion that the plaintiff could not succeed on this plaint in setting aside the deeds; because, if part of the money only was required for the repairs of the idol, or was represented to have been so required, and this was *bonâ fide* believed in by the grantees, the deeds would not be wholly void by reason that some of the money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted, and that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples. But that would not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to

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reimburse the *bonâ fide* purchasers so much of the money as had been legitimately advanced.

Their Lordships, in making these last observations, do not wish it to be understood that this is the case which appears upon the facts; they make these observations with reference only to the pleadings, and to indicate that, supposing that technical objection could have been made to the pleadings, it still would not have availed the appellant in the present appeal, because even so his suit in the present form could not have been sustained.

On the whole, therefore, their Lordships will humbly advise Her Majesty to affirm the judgment of the High Court, and to dismiss this appeal with costs.

Appeal dismissed.

Agents for the Appellant: Messrs. *Watkins* and *Lattey*.

Agents for the Respondents: Messrs. *Rogers* and *Judge*.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1877 *May* 4.

THE EMPRESS *v.* CHARU NAYIAH.*

Criminal Trespass—Infringement of exclusive right of fishery in public river—Penal Code, s. 447.

The unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of criminal trespass in the Indian Penal Code.

THIS case was referred to the High Court by the Civil and Sessions Judge of Backergunge, under s. 296 of the Criminal Procedure Code.

The accused Charu Nayiah, together with several other fishermen, were charged with having thrown their nets and fished in a certain river in which the complainant claimed an exclusive

* Criminal Reference, No. 31 of 1877.

right of fishery. The case was tried in the first instance by the Deputy Magistrate who convicted the prisoner Charu Nayiah under s. 447 of the Indian Penal Code of criminal trespass, and sentenced him to pay a fine of Rs. 50, or in default to suffer simple imprisonment for one month. The Magistrate of the district upheld the order of the Deputy Magistrate.

The Civil and Sessions Judge referred the case to the High Court, on the ground that the offence alleged to have been committed by the prisoner did not fall within the definition of criminal trespass in the Penal Code. The Sessions Judge, in his letter of reference, called the attention of the High Court to the following cases: *Khetter Nath Dutt* v. *Indro Jalia* (1), *Sristeedhur Paroee* v. *Indrobhoosun Chucherbutty* (2), *Kashi Chunder Dass* v. *Hurkishore Dass* (3), *Bhusun Parui* v. *Denonath Banerjee* (4).

The judgment of the Court was delivered by

MARKBY, J.—We agree with the Sessions Judge in thinking that the prisoner was wrongly committed. It was proved that the prisoner fished in a public river at a place where the prosecutor had the exclusive right of fishery. The Deputy Magistrate held that this constituted criminal trespass; but we do not think so. The law provides that whosoever enters into or upon property in the possession of another with a certain intent, is guilty of criminal trespass. But though a fishery is property, we do not think that a man who fishes in a public river enters upon property in the possession of another, though he may have no right to fish there. The river upon which the prisoner entered being a public one was not in the exclusive possession of any one, and a right of fishery is not property of such a nature as that a man who unlawfully infringes that right can be said to enter upon property in the possession of another within the meaning of the section.

Conviction quashed.

(1) 16 W. R., Cr., 78.
(2) 18 W. R., Cr., 25.
(3) 19 W. R., Cr., 47.
(4) 20 W. R., Cr., 15.

Before Mr Justice Markby and Mr Justice Prinsep

1877
May 3

THE EMPRESS *v.* JOY HARI KOR

Lunatic—Security—Criminal Procedure Code (Act X of 1872), *ss.* 426, 432 — *Jurisdiction of Criminal Courts*

The authority of the Criminal Courts over an accused, declared under s 426 of the Criminal Procedure Code to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s 432

ON the 29th of June, 1869, one Joy Hari Kor, a native of Munshigunge, Dacca, was tried before the Deputy Commissioner of Cachar on a charge of an attempt to commit suicide. The Court found him to be of unsound mind and incapable of making a defence, and procured his transfer to the Dacca Lunatic Asylum. Subsequently an application was made by a brother of the lunatic, under s. 426 of the Criminal Procedure Code, to the Magistrate of Dacca, offering the security required by the Act, and demanding that the lunatic be entrusted to his care. A reference was made to the High Court asking for the transfer of the case of the lunatic, originally tried at Cachar, to the file of Magistrate of Dacca, in order that such Court might the more conveniently deal with the application made under s. 426 of the Criminal Procedure Code.

The judgment of the Court was delivered by

MARKBY, J.—We think that we ought not to make the order asked for, because, even if the case were transferred to the Magistrate of Dacca, we do not think he would have power to release the lunatic upon taking security. The authority of the Magistrate appears to us to cease when the lunatic is handed over to the care of the Local Government, and it does not revive until the prisoner is sent back to the Magistrate under s. 432 on a certificate that he is capable of making his defence. The Deputy Commissioner can, if he thinks proper, bring the matter to the notice of the Government.

Application refused.

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ORIGINAL CIVIL

Before Mr. Justice Macpherson.

IN THE MATTER OF BITTAN (AN INFANT).

1877
April 12 & May 2.

Guardian, Appointment of—Infant—Power of High Court—Application by Petition without Suit.

On an application made on petition without suit for the appointment of a guardian of the person and property of an infant, the Court Receiver was appointed Receiver, and the property was ordered to be handed over to him with liberty to him to sell it and invest the proceeds in Government Paper, and the matter was referred to the Judge in Chambers for enquiry as to the proper person to be appointed guardian.

APPLICATION on petition for the appointment of a guardian.

The petition of Diljan Bye, described as the head of the Mahomedan dancing girls or Byes in Calcutta, and Bebeejan Bye, one of the dancing girls or Byes, stated, that Suddun Bye, the mother of the infant, died, about four years ago, in Calcutta, leaving the said infant, a sister named Byjan, and also certain personal property; that up to the time of her death she and her sister lived in the same house as members of a joint family, and both of them were unmarried and carried on the profession of Byes or dancing girls; that on the death of Suddun Bye, her sister took possession of all the property, and supported the said infant up to the time of her death; that the sister died on 20th May, 1876, in Calcutta, leaving the said infant, and an aged grandmother, Chotti Bebee, and also leaving property and effects within the local limits of the jurisdiction of the High Court to be administered to; that on the death of Byjan, Chotti Bebee, her grandmother, took possession of all her estate and effects, and the estate and effects left by Suddun Bye, and took charge of the infant, and fed and clothed her up to the time of her death in October, 1876; that the infant, on the death of her mother and aunt, became entitled to certain personal property of the value of about Rs. 4,000 or 5,000, which, at the death of the said Chotti Bebee, came into the possession of the petitioners, who, since the

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death of Chotti Bebee, had maintained the infant; that the said infant was of the age of four years, and kad no relatives or next-of-kin whatever; that being of tender years, the said infant could not take charge of or manage her property, and that the petitioners were not willing to take upon themselves any further risk by taking charge of the property without an order of Court appointing them guardians of the person and property of the said infant.

The petitioners prayed for an order appointing them guardians of the infant's person and property.

Mr. *Trevelyan* for the petitioners.—[MACPHERSON, J.—There being no suit, has the Court power to make such an order?] It is submitted it has. The power which the Court has under the Charter of 1865, s. 16, is the power which the Supreme Court had. That Court had the power of the Court of Chancery in such matters; see Sibson on Infants, 223; Daniell's Chancery Practice, 1189 and 1190. It appears from these authorities that the Court of Chancery has power to appoint a guardian on petition without suit. The rules of the Supreme Court on the matter refer to petitions generally without any reference to any suit; see Smoult and Ryan's Equity Rules, 170. [MACPHERSON, J.—The question is what was the practice of the Supreme Court at the time the High Court was instituted.] See *In the matter of Ann Butler* (1), and *Ex parte Lokecaunt Mullick* (2).

Cur. adv. vult.

The Court mentions that the order should be to refer it to the Judge in Chambers to enquire whether the petitioners, or any other person to be named, are proper persons to be guardians of the child; and that the petitioners do hand over the property in their hands to the Court Receiver, who is appointed the Receiver in this matter, with liberty to the Receiver to sell the property and invest the proceeds in Company's Paper. Costs to come out of the estate.

(1) Morton's Dec., 262.

(2) Morley's Dig., Vol. II, 42.

Before Mr. Justice Macpherson.

IN THE MATTER OF BUNGSEEDHUR KHETTRY (AN INSOLVENT).
CLAIM OF RAMLALL BUDREE DOSS.

1877
April 26 & *May* 2.

Insolvent Act (11 and 12 Vict., c. 49), s. 24—Order and Disposition.

On the night previous to *B.'s* being adjudicated insolvent, about 10 P. M., the firm of *R. B. D.*, at their place of business, promised to give *B.* a loan of Rs. 5,000 if he would the next morning deliver to them goods to that amount, and would, in the meantime, satisfy them that he had sufficient goods in his godown, and allow the firm of *R. B. D.* to put their lock on the door of the godown to secure the goods until they had received the value of the loan. Thereupon *B.* took the gomasta of the firm of *R. B. D.* to his godown, let him see that it contained goods worth more than Rs. 5,000, and allowed him to put a lock on the door, *B.* at the same time replacing his own locks. The gomasta and *B.* then returned to the office of *R. B. D.*, where Rs. 5,000 were paid to *B.*, who promised to deliver the next morning Rs. 5,000 worth of goods out of the godown which had been locked up. Having received the money, *B.* absconded from Calcutta that same night and never returned to his place of business. The next day he was adjudicated an insolvent. *Held*, that the goods in the godown were not in the order and disposition of *B.* within the meaning of s. 24 of the Insolvent Act.

THIS was a claim by the firm of Ramlall Budree Doss, carrying on the business of bankers in Calcutta, to the sum of Rs. 5,680-10, being the proceeds of certain goods which were in the godowns of Bungseedhur Khettry when he was adjudicated insolvent, but which the claimants alleged were made over to them previous to the insolvency. The goods had been sold and the proceeds were in the hands of the Official Assignee.

The circumstances under which the goods were alleged to have been made over to the claimant were set out as follows in the affidavits.

The affidavit of Moteeram and Buldeo Doss stated that Moteeram was, on the 20th December, 1876, the head gomasta of the banking firm of Ramlall Budree Doss in Calcutta, and that Buldeo Doss was at that time the cashier of that firm; that about 10 o'clock on the night of the 20th December, Bungseedhur Khettry called at the place of business of Ramlall Budree Doss, and said he was in great need of money and asked for a

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loan from the firm, which, he stated, he wanted to meet a certain hundi held by Ramlall Budree Doss and drawn on himself, which was due on that day, and for other pressing demands; that Moteeram told him he could have a loan if he could give security, to which he replied that he had goods in his godowns which he promised to make over to Ramlall Budree Doss in the morning, but he wanted a loan of Rs. 15,000 at once, which Moteeram refused; that Bungseedhur then requested Moteeram to send some person to take charge of a godown in which, he said, he had goods of considerable value, and place a lock upon it, and asked for an immediate loan of Rs. 5,000 to save his credit, promising to make out a full list and valuation of the goods he had available to give as security in the morning, when he would sign a proper writing to secure repayment of any advances, including the said hundi; that Moteeram knowing that the firm of Ramlall Budree Doss had had other transactions in hundis with Bungseedhur, and being willing to save his credit, directed Buldeo Doss to go with Bungseedhur to ascertain if the godown contained sufficient goods to cover the required advance; that Buldeo Doss taking a lock and key with him accompanied Bungseedhur to his place of business, and Bungseedhur opened the door of a certain godown in which were boxes of cloths, and Buldeo Doss believing and being assured by Bungseedhur that the godown contained goods of considerable value, placed the lock he had brought with him on the door and locked up the godown, and went back to his place of business; that by order and direction of Moteeram the sum of Rs. 5,000 was then paid to Bungseedhur, it being agreed that a full list of the contents of the boxes in the godown should be made in the morning and a further advance made to Bungseedhur according to the amount of security found in the godown, and a proper writing taken from him to secure the same and the amount of the said hundi; that Buldeo Doss, after sending a jemadar, who failed to find Bungseedhur, went later on the same night to Bungseedhur's place of business to get the hundi accepted by him, and he then examined the lock he had put on the godown door and found two other locks there which were not there when he put the lock on as aforesaid; that proceedings were about being

taken to bring a suit against Bungseedhur, who had absconded, in respect of these transactions, but he was adjudicated insolvent, and no suit was therefore instituted; and that the proceeds of the sale of the goods in the godown in the hands of the Official Assignee amounted to Rs. 5,680-10.

The affidavit of Bungseedhur stated that, on 20th December, he was the managing partner of the business then being carried on, under the style of Nanoo Mull, in Calcutta; that he went, as stated, on the 20th of December, to the firm of Ramlall Budree Doss, but the transactions took place not with Moteeram but with Shah Muttra Doss, the proprietor of the business, and the loan asked for was Rs. 5,000, not Rs. 15,000; that on asking for the loan he offered to hypothecate to Muttra Doss's firm by actual delivery (without writing of any kind) on the following morning such a portion of the goods then in the godown as would be sufficient to cover the loan; that Buldeo Doss went with him to the godown to satisfy himself of the goods being there, and in Buldeo Doss's presence Bungseedhur left his own two locks, which were on the door when it was opened to allow Buldeo Doss to see the goods, on the door, in addition to the one put on by Buldeo Doss; that it was not contemplated that Ramlall Budree Doss were to have exclusive charge of the godown, or that a list would be made out and a writing signed the next morning to secure repayment of any advance, and that there were goods in the godown of the value of Rs. 10,000, and Bungseedhur never intended to withdraw his own possession of the goods in the godown or any separate and distinct part thereof for the loan of Rs. 5,000; that he obtained the Rs. 5,000, and was then obliged to abscond to avoid his creditors.

Bungseedhur was adjudicated insolvent on the 21st December, the day after the above transaction was alleged to have taken place; and the question in this matter was whether the goods were in the order and disposition of the insolvent so as to pass to the Official Assignee, the claimants contending that the goods, or at least a sufficient portion of them to cover the loan, were, under the circumstances, actually delivered to them and for *bonâ fide* consideration, and that therefore they had a lien on the proceeds of sale in the hands of the Official Assignee.

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Mr. *Ingram* for the Official Assignee.—At most the transaction amounted to a mere promise to execute a mortgage of a portion of the goods; no portion of the goods was actually separated specifically. They were still left in the possession of the insolvent, who says that he never made any mortgage of them on that night, and that his own two locks, which had previously been on the door, remained there. Under the circumstances they were in the order and disposition of the insolvent, and the alienation, therefore, is void as against the Official Assignee. The cases on the question of order and disposition are of two classes,—first, where the property was originally that of the insolvent; second, where property of another person is in possession of the insolvent. This is a case of the first kind. The principles are laid down in the following cases and authorities: *Lingard* v. *Messiter* (1); *Knowles* v. *Horsfall* (2); *Ex parte Staner* (3); see Tudor's Leading Cases at page 462; *In re Agabeg* (4); *Ex parte Marjoribanks* (5); *Darby* v. *Smith* (6); and Vol. I, Griffiths on Bankruptcy, ch. 8, s. 5, pp. 444—480. The general rule is that when property is vested in the insolvent, he will be the reputed owner, unless a change of possession be made in as clear and distinct a manner as possible so as to be notorious to the world. Here the transfer was not so made, and, it is submitted, was not sufficient to take the property from the Official Assignee.

Mr. *Jackson* for the claimant.—The validity of the alienation does not depend on its notoriety; it would be impracticable in many cases, as here where it took place at midnight, to make the transfer public; it depends on its being made *bonâ fide*. The test is whether there was any improper dealing or want of *bonâ fides* in leaving the goods in the insolvent's possession, as by letting him have false credit: *Hamilton* v. *Bell* (7). This test distinguishes *Lingard* v. *Messiter* (1) and *Knowles* v. *Horsfall* (2). The principle is the same in both classes of cases mentioned—*Reynolds* v. *Bowley* (8), *Harman* v. *Fishar* (9).

(1) 1 B. & C., 308.
(2) 5 B. & Ald., 134.
(3) 33 L. T., 244.
(4) 2 I. J., N. S., 340.
(5) 1 De Gex, 466.
(6) 8 T. R., 82.
(7) 10 Exch., 545.
(8) L. R., 2 Q. B., 474.
(9) Tudor's Leading Cases, 525.

As to *Ex parte Staner* (1) it is contrary to the case of *Ex parte Marrable* (2). On the facts of this case as appearing in the affidavits, the learned Counsel submitted that the goods were not in the order and disposition of the insolvent.

Mr. *Ingram* in reply.—The case of *Hamilton* v. *Bell* (3) is distinguishable as applying to the second class of cases referred to by me. *Reynolds* v. *Bowley* (4) is not in point in this case; it refers to the liability of a dormant partner inasmuch as he is just as much in possession as any other partner. In the case of *Ex parte Marrable* (2), the property was set apart and specified so that the bankrupt could not have dealt with it, and the purchaser could have made a good title. It is, moreover, contrary to subsequent authorities. Here neither party could have dealt with the goods.

Cur. adv. vult.

MACPHERSON, J.—On these affidavits I find the facts to be, that, about 10 P. M. on the 20th of December, the firm of Ramlall Budree Doss, merchants in the Burra Bazar, promised at once to give Rs. 5,000 to the insolvent if he would next morning deliver to them goods to that amount, and would in the meantime satisfy them that he had sufficient goods in his godown and would allow them (Ramlall Budree Doss) to put their lock on the door of the godown so as to secure the goods therein until they had received the value of their Rs. 5,000. Thereupon the insolvent took the gomasta of Ramlall Budree Doss to his godown, let him see that it contained goods worth more than Rs. 5,000, and allowed him to put his masters' lock on the door, while the insolvent, at the same time, replaced his own locks.

The gomasta and the insolvent then returned to Ramlall Budree Doss' kothi, where Rs. 5,000 were at once paid to the insolvent, who promised to deliver in the morning Rs. 5,000 worth of goods out of the godown which had been locked up. Having got the money, the insolvent absconded from Calcutta that same night, and never returned to his place of business.

Next day he was adjudicated insolvent, and the question

(1) 33 L. T., 244
(2) 1 Glyn and Jamieson, 402.
(3) 10 Exch., 545.
(4) L. R., 2 Q. B., 474.

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now is, whether the goods in that godown passed to the Official Assignee, as being in the order and disposition of the insolvent. I have considered the cases to which I was referred in the course of the argument, and certain other cases also, in particular that of *Ex parte Watkins* (1); and I think I am bound to hold that the goods did not remain in the order and disposition of the insolvent within the meaning of the statute.

The goods which were to be given to Ramlall Budree Doss in return for the Rs. 5,000 were, it is true, not actually set apart on that night, and the agreement was that they should not be formally set apart and delivered until next morning. But the godown containing the goods was secured by the lock of Ramlall Budree Doss, and was no longer under the control of the insolvent; and the Rs. 5,000 were paid in consideration of the godown having been so secured. After the locks were put on, the goods could not be dealt with save through the joint action of Ramlall Budree Doss and the insolvent, and they were in fact no longer in his order and disposition, but were subjeet to the lien of Ramlall Budree Doss. As to the notoriety of the transfer of possession or of the creation of the lien, the transaction was conducted with as much notoriety as was under the circumstances possible.

On the whole I think that Ramlall Budree Doss have established their claim, and are entitled to be paid out of the proceeds of the sale of these goods the sum of Rs. 5,000 and their costs of this application.

The matter is one of some doubt, and the Official Assignee was clearly right in resisting the claim and having the question inquired into and discussed, and his costs must be borne by the estate.

Claim allowed.

Attorney for Ramlall Budree Doss: Mr. *Paliologus.*

Attorneys for the Official Assignee: Messrs. *Dignam* and *Robinson.*

(1) 8 L. R., Ch., 520.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice R. C. Mitter.

JANOKEE DEBEA (PLAINTIFF) *v.* GOPAUL ACHARJEA AND ANOTHER (DEFENDANTS).*

1877 *Jany.* 29.

Hindu Law—Eldest Son, Adoption of—Shebaitship—Succession of a Hindu Widow as Shebait—Special Custom.

In a suit by a Hindu widow to recover possession of certain property dedicated to idols, as heir to her deceased husband, the last shebait, it appeared that the plaintiff's husband was an adopted son of his predecessor in office, and that he was the eldest son of the first defendant who was the nearest male cognate of the adoptive father. On behalf of the defendant it was contended, (1) that the adoption of an eldest son was invalid, and that consequently plaintiff's husband did not succeed rightfully to the shebaitship; and (2) that the right of succession to a shebaitship was not governed by the ordinary rules of inheritance, and that the plaintiff had no title thereto. *Held*, that the adoption of an eldest son, where there are several sons, was not invalid by Hindu law. *Held* also, that a Hindu widow could not succeed to a shebaitship as heir to her husband without proof of special custom. In this case there was no sufficient proof of such custom.

THE facts and arguments in this case are sufficiently stated in the judgment of the Court.

The following authorities were cited on both sides:—

Dattaka Mimansa, s. 4, vv. 1, 2, and 3; Dattaka Chandrika, s. 4, vv. 29 and 30; Mitakshara, chap. 1, s. 11, vv. 11 and 12; 3 Colebrooke's Digest, Bk. V, s. 8, v. 273; 1 Strange's Hindu Law, chap. iv, pp. 73—75; *Chinna Gaundan* v. *Kumara Gaundan* (1); *Raja Opendur Lal Roy* v. *Ranee Bromo Moyee* (2); *Seetaram* v. *Dhunnook Dharee Sahye* (3); *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee* (4); *Rajah Chundernath Roy* v. *The Collector of Moorshedabad* (5); *Basoo Dhul* v. *Kishen Sheander Geer Gosain* (6); *Maharanee Shibessouree Debia* v. *Mothooranath Acharjo* (7); *Jugbundo Run Singh* v. *Radasham Narendro Mahapattur* (8).

* Regular Appeal, No. 12 of 1875, against a decree of Moulvi Khadem Hosain, Subordinate Judge of Zilla Manbhoom, dated the 31st August, 1874.

(1) 1 Mad. H. C. Rep., 54.
(2) 10 W. R., 347.
(3) 1 Hay's Rep., 260.
(4) 6 Moore's I. A., 66.
(5) 11 B. L. R., 86.
(6) 13 W. R., 200.
(7) 13 Moore's I. A., 270.
(8) S. D. A. for 1859, p. 1556.

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Baboos *Mohini Mohan Roy*, *Aushootosh Dhur*, and *Bama Churn Banerjee* for the appellant.

Baboos *Srinath Das*, *Gopal Lal Mitter*, and *Kally Kishen Sen* for the respondents.

The judgment of the Court was delivered by

MARKBY, J.—This suit was brought to recover possession of certain properties which the plaintiff alleged to be partly brohmuttur and partly debuttur, the latter being dedicated to certain deities of the names of Keshub Roy, &c., and also for the possession of the deities themselves from the hands of the first defendant, Gopaul Acharjea Gossami. Although the plaintiff described a part of the claim as her own brohmuttur properties, which have devolved upon her by right of inheritance, yet it appears from the judgment of the Court below that it was admitted by both parties that the whole of the claim consisted of properties which, without a single exception, belong to the aforesaid deities. The witnesses of the plaintiff also described them as debuttur properties belonging to those deities. We shall, therefore, consider that the plaintiff in the Court below abandoned her claim upon her own title, and was satisfied to rest the whole suit upon her right to recover possession of the disputed properties as shebait, or manager, on behalf of the aforesaid idols.

It was alleged that the properties were in the possession of one Luckun Acharjea Gossami as shebait of these idols; that Luckun Acharjea Gossami having no son of his body, took the plaintiff's husband, Bejoy Luckee Acharjea, in adoption, and died in the month of Kartick, 1266 (October—November, 1859); the plaintiff's husband being then a minor, her mother-in-law took possession of the properties on behalf of her minor son, the right of shebaitship having devolved upon him in the same way as any other property of the deceased would have devolved upon him by right of inheritance. The plaintiff's case was that the idols were established by a remote ancestor of her husband, and the right of shebait had devolved from one person to another following the same rule of succession as that which governs the succession of an ordinary heritable property.

It was further alleged that her mother-in-law thus remained in possession of the properties in suit on behalf of her minor son up to the 24th Bhadro, 1270 (8th September, 1863), when her husband died and the right of shebait devolved upon her as his widow. But she being then a minor, her mother-in-law managed the sheba for her till the time of the death of her mother-in-law, which event occurred in the month of Falgoon (March, 1864) of the same year.

Upon the death of her mother-in-law the defendant No. 1, the father of her husband, attempted to take possession of the disputed properties along with the debsheba. He was opposed on her behalf by her maternal uncle and father, the second and third defendants.

At this time, there having been a number of documents relating to some of the debsheba properties in the Income Tax Office of the district, the first defendant, as the shebait of the idols, applied to get them back. This application was opposed by a counter-petition by the plaintiff's father on behalf of the plaintiff. While this matter was pending decision by the Income Tax authorities, a compromise was effected between the plaintiff's father and maternal uncle on her behalf on the one side, and defendant No. 1 on the other. By this compromise a portion of the disputed properties, yielding an annual profit of Rs. 3,000, was set apart and made over to the plaintiff for the purpose of defraying the expenses of morning sheba of the deities, which by the terms of the ruffanamah she would be bound to perform; the remaining properties were to be in the possession of defendant No. 1, who was to be considered the chief shebait.

The plaintiff, on attaining majority, demanded from the first defendant restoration of the properties left in his possession, and on his refusal to restore them the present suit has been brought.

The first defendant alleged that the plaintiff's suit was barred by the law of limitation, and that the plaintiff's husband's adoption was not valid according to the Hindu law; first, because he was the eldest son of the defendant; secondly, because the relationship between him and the adoptive father was such as would render an adoption invalid in him; thirdly, because the necessary

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ceremonies of adoption were not duly performed; and fourthly, because the adoptive father was afflicted with certain incurable diseases which rendered his body impure, and made him incompetent to perform the necessary ceremonies of adoption.

The defendant further alleged that the plaintiff, being a female, was not competent to perform those duties which ordinarily devolve upon a shebait; and that the succession of a female to shebaitship was opposed to the custom of their family; that the plaintiff, therefore, being not entitled to succeed as a shebait, he, the defendant, as the nearest male cognate relation of the last shebait, was entitled to succeed; that originally this debsheba was founded by an ancestor of the present Rajah Pauchkotte, and that the title of a shebait was not complete unless confirmed in his appointment by the Rajah of Pauchkotte for the time being; that Rajah Nilmoney Sing Deo, the present Rajah, had made the necessary confirmation in his favour. Rajah Nilmoney Sing Deo, who has been added as a defendant, put in a written statement in support of the defendant's allegations.

The Lower Court overruled the plea of limitation, finding that the present suit had been brought within twelve years from the death of the last shebait, who was admittedly in possession, and through whom the plaintiff professes to make her title.

The Lower Court further found that the plaintiff's husband was duly adopted by Luckun Acharjea, and that the necessary ceremonies of adoption were performed; but that the plaintiff's husband was the eldest son of Gopaul Acharjea, and that, according to the Hindu law, the adoption of the eldest son being not legal, his adoption by Luckun Acharjea was invalid. As regards the rule of succession to this estate, the Lower Court found that it was admittedly a debuttur property; that the ordinary law of inheritance did not regulate the succession of one shebait to another; that the object for which the sheba was established, and the duties devolving upon the shebait, were such that a Hindu widow under the law would be incompetent to fulfil; that the ruffanamah, far from being injurious, was highly beneficial to the interests of the plaintiff; that although the defendant had in a petition admitted that

the plaintiff's husband was the adopted son, yet he was not estopped from questioning the validity of the adoption.

Upon these grounds the Lower Court dismissed the plaintiff's suit with costs.

In appeal the first question raised before us is, whether the decision of the Lower Court upon the validity of the plaintiff's husband's adoption is correct in law, or not.

That Dattaka Chandrika and Dattaka Mimansa are works of paramount authority on the Hindu law of adoption, is admitted on all hands. Referring to them we find the contention of the appellant is fully borne out. Paras. 29 and 30, s. 1 of Dattaka Chandrika are to the following effect: "29. In answer to the question by whom is a son to be given, Saunaka declares: 'By no man having an only son is the gift of a son to be ever made. By a man having several sons such gift is to be anxiously made.' 30. The author, apprehending an extinction of lineage in case of the gift of a son by one even having two sons, says—'By one having several sons.'"

On the same subject the following rules are laid down in Dattaka Mimansa (1): "1. Next, in reply to the question as to the qualification of the person to be affiliated, Saunaka declares: 'By no man having an only son (ekaputra) is the gift of a son to be ever made. By a man having several sons (bahuputra) such gift is to be made on account of difficulty (prayatnatos).' 2. He who has one son only, is ekaputra, or one having an only son; by such a one the gift of that son must not be made; for a text of Vasishtha declares, 'an only son let no man give,' &c. 3. Since the word 'gift' means the establishing another's property after the previous extinction of one's own, and another's property cannot be established without his acceptance, the author (Saunaka) implies this also in his text in question. Therefore, prohibition likewise against acceptance is established by that very text. Accordingly Vasishtha: 'An only son let no man give or accept,' &c., &c. 4. To this he subjoins a reason, 'for he is (destined) to continue the line of his ancestors.' His being intended for lineage,

(1) Para. 1, s. iv.

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being thus ordained in the gift of an only son, the offence of extinction of lineage is implied. Now this is incurred by both the giver and adopter also. For the (reason in question) is subjoined after both (verbs, *viz.*, 'give and accept'). 5. As for another text of recorded law: 'In instruction, the father is absolute over a son and sons' wives, but not so with respect to the son in sale and gift;' and the text of the holy saint, 'Except a wife and a son other things may be given.' These texts regard the case of an only son. 6. ('Ever') in a time of calamity, accordingly, Narada says: 'A deposit, a son, and a wife, the whole estate of a man who has issue living, the sages have declared unalienable, even by a man oppressed by grievous calamities, although the property be solely that of the man himself.' This text also regards an only son, for it is declaratory of the same import as the texts of Saunaka and Vasishtha. 7. Next, the author replies to the question—By whom is a son to be given? 'By one having several sons.' He who has several sons, is 'bahuputra,' or 'one having several sons.' 8. 'By no man having an only son.' From this prohibition, the gift by one having two sons being inferrible. This part of the text ('by one having several sons, &c.') is subjoined to prohibit the same by one having two sons also; for the speech of Santanu to Bhishma expresses: 'He who has only one son is considered by me as one destitute of male issue,' oh! descendant of Kuru, one who has only one eye is as one destitute of both; should his only eye be lost he is absolutely blind.'"

From these passages it is clear that the gift and acceptance of an only son are strictly prohibited, but there is no prohibition against the gift of the eldest son. On the other hand, the text—"by a man having several sons such gift is to be anxiously made,"—clearly implies the validity of the adoption of the eldest out of several sons.

The only authority relied upon by the other side is to be found in paragraphs 11 and 12 of s. 11, Chapter I, Mitakshara, which are to the following effect: "11. So an only son must not be given (nor accepted), for Vasishtha ordains,

'Let no man give or accept an only son.' 12. Nor, though a numercus progeny exist, should an eldest son be given; for he chiefly fulfils the office of a son as is shown by the following text: 'By the eldest son, as soon as born, a man becomes the father of male issue.'"

Comparing these paragraphs with the rules laid down in Dattaka Chandrika and Dattaka Mimansa quoted above, we do not think that paragraph 12 of Chapter I, s. 11 of the Mitakshara ought to be construed so as to render an adoption of the eldest son out of *several* sons invalid in law. It only repeats a doctrine well established amongst the Hindu lawyers that amongst several sons of a Hindu father, the eldest born occupies the first rank. The prohibition is only admonitory, if I may so express myself, and not mandatory: that this is the correct construction of the paragraph in question is also clear from the preceding verse. There the prohibition is clear, the text quoted distinctly declaring—"Let no man give or accept an only son." It is not so in paragraph 12, which, on the other hand, has a tendency to indicate that the prohibition as to the gift of the eldest son is not intended to be regarded as a legal prohibition.

Only two decided cases from Bengal have been quoted before us—*Seetaram* v. *Dhunnook Dharee Sahye* (1) and *Jugbundo Run Singh* v. *Radasham Narendro Mahapattur* (2),—the former supporting the contention of the appellant, and the latter taking an opposite view. For the reasons given above, we are inclined to follow the High Court ruling, which, as far as we have been able to ascertain, is fully supported by decisions of the Bombay and Madras Courts. We are, therefore, of opinion that the Lower Court was not right in holding that the adoption of the plaintiff's husband was invalid by reason of his having been the eldest son of his natural father.

Another contention has been made in this Court on behalf of the respondent regarding the invalidity of the plaintiff's husband's adoption, which was not raised in the Court below. It has been argued that at the time of the adoption, the plain-

(1) 1 Hay's Rep., 260.

(2) S. D. A., 1859, p. 1556; see p. 1560.

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tiff's husband was one of two sons of his natural father, and that the texts from Dattaka Chandrika and Mimansa, quoted above, established that an adoption under such circumstances is invalid in law.

We do not think that we ought to entertain this objection. This question of law can only arise upon the establishment of a particular fact, which was neither alleged in the Court below nor any issue raised upon it. We, therefore, abstain from discussing it any further.

Then we come to the most important question in the case,—namely, who, upon the death of the plaintiff's husband, was entitled to succeed as shebait to the debuttur properties in dispute in this case.

There are certain peculiarities in the history of this office which render it necessary to approach the consideration of this question with very great caution. But finding as we do the defendant Gopaul in possession of the office, and the objects of the endowment being carried out under an arrangement undoubtedly made in good faith by the members of the family for that purpose, we feel the greatest unwillingness to disturb that arrangement. Without, therefore, saying that there is anything in the nature of this office which would prevent its being confined to the members of a particular family and being regulated by the ordinary rules of inheritance, and without accepting the view taken by the Subordinate Judge that females would by reason of their sex be excluded from the succession, we still think that the plaintiff ought to make out clearly that (as she asserts) she is entitled as heiress of her husband to succeed to the office, and to turn out the defendant Gopaul. The presumption in her favour from her husband having been in possession would not apply in this case in the same way and with the same force as if the question were—who was to succeed to her husband's private estate. There the ordinary rule of inheritance must prevail unless displaced by some special rule. Here the very question at issue is whether the rule of inheritance prevails at all. It is, therefore, necessary to look into the history of the endowment since its establishment to see how the office of shebait has in fact devolved

from one holder to the other. We may say at once that there is, in our opinion, no satisfactory evidence before us that the appointments have been made by the Rajah of Pauchkote. The attempt to base the claim of the defendant Gopaul to be shebait upon his appointment by the rajah, and the claim of the rajah to the right to appoint, have therefore failed. Then what is the evidence that the office descends in the family of the plaintiff's husband according to the rules of inheritance under Hindu law? The first shebait, Rungraj, left only a daughter, Auchuma, who married, and the issue was again an only daughter, Benconna. This daughter also married, and a third time the only issue was a daughter, Lukhipria. And, according to the plaintiff's case, this curious coincidence was again repeated by Lukhipria having an only daughter called Kedroo Bibee, who married Lukun Acharjea, the great grandfather of the plaintiff's husband. There has been much contention whether (as the plaintiff asserts) these four daughters succeeded each other as shebaits, or whether, as the defendant Gopaul asserts, their husbands were the shebaits. The Subordinate Judge takes the latter view. He thinks that, in each case, the shebait for the time selected his successor, and married his daughter to him. On the other hand, there is, undoubtedly, evidence that the daughters in some cases continued to hold possession of the guddee after the death of their husbands. This was certainly so in the case of Lukhipria, who is said to have held the guddee nearly 60 years; and this seems inconsistent with the notion that the daughters had no independent title. But this at least is certain that the succession has not followed the ordinary rules of inheritance under Hindu law. Whether the husbands or the wives were shebaits, neither after the first generation could claim by inheritance. There is no pretence that the husbands were heirs to each other or to Rungraj, and the daughter of a daughter is not an heir except in certain classes of *stridhun*. Lukhipria herself was no heiress; nor was her mother Benconna; nor was her daughter Kedroo Bibee. The Hindu law of inheritance, for which the plaintiff contends, does not explain the devolution of the office in either of the two lives contended for.

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There is no doubt very considerable difficulty in ascertaining what is the true rule of succession to this office. Probably it has hitherto been disposed of in a manner which has been generally approved of by all parties concerned. It is sufficient for us to say that the evidence does not, in our opinion, establish the plaintiff's right to succeed under the Hindu law of inheritance.

The decree of the lower Court was, therefore, right, and this appeal must be dismissed. The plaintiff, appellant, will pay the costs of the defendant, respondent, Gopaul Acharjea; the Rajah will pay his own costs.

Appeal dismissed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1877 *April* 25.

KISHEN GOPAUL MAWAR (DEFENDANT) *v.* BARNES (PLAINTIFF).*

Beng. Act VIII of 1869, *ss.* 2, 21, 22, *and* 52—*Ejectment—Arrears of Rent—Bhaoli Rent.*

Under the provisions of Beng. Act VIII of 1869 a suit in ejectment will lie for arrears of rent due on a bhaoli tenure.

A suit which is in reality a claim for compensation for use and occupation of lands, cannot be described as a suit for arrears of rent under s. 52 of Beng. Act VIII of 1869.

THIS was a suit for the recovery of Rs. 550 and 4 annas principal, with interest, on account of arrears of rent due (after giving the defendant credit for certain moneys paid into Court) in respect of 69 bigas and 6 cottas of nagdi lands, at different rates, together with certain bhaoli lands. The plaintiff also prayed that the defendant be dispossessed from such lands under s. 52 of Beng. Act VIII of 1869. The plaint further stated that 69 bigas 6 cottas of nagdi land was made up of 67 bigas 6 cottas originally leased to the defendant, and 2 bigas of land brought into cultivation by the defendant during the term of his lease, and on which the plain-

* Special Appeal, No. 1391 of 1875, against a decree of R. Towers, Esq., Subordinate Judge of Zilla Bhagulpore, dated the 25th March, 1875, affirming a decree of Baboo Gopee Nath Matey, Sudder Munsif of that district, dated the 8th December, 1874.

tiff had assessed a rent of Rs. 5 a biga, agreeably to the rate prevailing in the village. In the Munsif's Court the plaintiff obtained a decree for the whole of the arrears of rent due on the nagdi and bhaoli lands comprised in the original lease. With respect to the two bigas originally brought into cultivation by the defendant, the Munsif modified the rate of rent according to the rate of certain of the nagdi lands in the defendant's occupation. There was also the usual decree for ejectment on failure of satisfaction being entered into within fifteen days of the date of decree. On appeal the Judge upheld the decision of the Munsif, and the defendant preferred a special appeal to the High Court.

Baboo *Hem Chunder Banerjee* and Mr. *Younan* for the appellant.

Baboos *Bhyrab Chunder Banerjee* and *Bama Churn Banerjee* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—The question between the parties in this special appeal is, whether or no the decree passed under s. 52, Beng. Act VIII of 1869, by which the defendant was directed to pay a certain amount as arrears of rent within fifteen days, otherwise he was to be ejected, is good in law.

It appears that the Court below has held that the land to which the suit relates consisted of two portions,—one of which is nagdi land, and the other bhaoli land. There was an objection taken in special appeal that the Court below was wrong in treating any of these lands as bhaoli. But we expressed our opinion in the course of the argument yesterday that there was nothing in that objection. No doubt there was evidence that, for some time, the land had been in possession of a person under the present plaintiff, between whom and the defendant the rent was treated as all payable in money: but that could not alter the terms of the tenancy as between the plaintiff and the defendant, and when that intermediate interest terminated, the land was held partly as bhaoli as before.

Then arises the important question in this case, whether the provisions of the law in respect of ejectment upon nonpay-

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ment of arrears of rent can be applied to bhaoli land. I admit that, on first reading these sections of the Act relating to this matter, I was under the impression that they did refer only to rents reserved in money. But, on further consideration, I think that the construction of the sections is that they cover not only rent reserved in money but rent reserved in kind. S. 52 provides for ejectment for nonpayment of arrears of rent. An arrear of rent is defined by s. 21. It says: "Any instalment of rent which is not paid on or before the day when the same is payable according to the potta or engagement, or if there be no written specification of the time of payment, at or before the time when such instalment is payable according to established usage, shall be held to be an arrear of rent under this Act, and, unless otherwise provided by written agreement, shall be liable to interest at twelve per centum per annum." Now the word 'rent' may, undoubtedly, include both rent in kind and rent in money. But the word 'paid' does at first sight suggest rent reserved in money. But when we turn to s. 2, it is clear from that that the Legislature did not use the word 'paid' in reference to rent reserved in money only, because in s. 2 we find the expression "if the rent is payable in kind," thereby clearly showing that the Legislature at any rate considered that the word 'paid' or 'payable' was a proper expression for the proportionate produce which had to be delivered in kind, or a bhaoli tenure. No doubt there are also the words at the end of s. 21 which provide for interest on an arrear of rent. But then I think those words may be applied to a case of arrear of rent which is payable in kind, because, as we know, those arrears, though originally reserved in kind, are ultimately, as between the parties, almost always payable in money. There is, therefore, nothing in the words of the law which is inconsistent with the term "arrears of rent" including arrears of rent in kind, as well as arrears of rent in money; and I think the reasonable construction to put upon the Act is, that both kinds of arrears are included. I cannot see any reason why a landlord whose rent is payable in kind should not have the same remedies as a landlord whose rent is payable in money. There being nothing in the Act which is any way

inconsistent with this reasonable construction, I think we ought to put that construction upon it.

Then this further objection is raised to this decree by the appellant, that the plaintiff's (respondent's) own jamma-wasil-baki papers show that there had been a full payment of all that was due upon the nagdi portion of the tenure. Now the only evidence before us upon that point is the jamma-wasil-baki paper. No doubt those two tenures are distinct. But then we find in making up the account, following out the custom to which I have already alluded, after the proprietor's share upon the bhaoli portion of the tenure has been ascertained, that is turned into money, and one lump sum is found to be due from the ryot to the landlord. The sum which has been paid on account is credited not to the nagdi tenure in particular, but the total sum found to be due by adding the two rents together. There is no evidence that the ryot himself appropriated this payment to the nagdi tenure. All that we have is this document, and on this document we are bound to treat it as a general payment on account. On that objection, therefore, the special appeal has failed.

Then there is another objection which it is more difficult to get over. It appears that the ryot has, in addition to the original 67 bigas and odd cottas of land, of which the nagdi portion of the tenure consisted, taken into his possession two bigas more. Now, in suing the tenant in respect of the rent of these two bigas, the landlord does not treat these two bigas as an addition to the nagdi tenure held upon the same terms as the rest of the nagdi tenure. He chooses to place on those two bigas a rent of Rs. 5, which is more than the rate at which the nagdi tenure is assessed. It is not shown that that rent has ever been paid by the tenant. The suit, therefore, in reality, so far as it relates to those two bigas, is a suit to recover compensation for the use and occupation of those two bigas. And the question then arises whether that can be an arrear of rent to which the provisions of s. 52 can be applied.

In order to decide that question, we must, as in deciding the other question upon the construction of the Act, go back to

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s. 21 and see what an "arrear of rent" is. That section speaks of an arrear of rent as "any instalment of rent which is not paid." Now I do not think it possible to say with regard to those two bigas that there was any instalment of rent which remained unpaid. No doubt there had been for a considerable time something due from the ryot to the landlord for the occupation of this land, but I think the words "instalment of rent which is not paid" assume a rent which has been fixed, which has become due at the expiry of certain recovering periods, and which had not been paid by the tenant. I think, therefore, it is impossible to say that, as regards those two bigas, there was an arrear of rent due which remained unpaid when the suit was brought. Although that is a small portion of the tenure in respect of which the suit was brought to recover rent, still, according to the decisions of this Court, that error will vitiate the whole decree. The tenant is to be ejected under s. 52 if he does not pay the amount of rent specified in the decree. But the amount specified in the decree must consist entirely of arrears of rent due. And if it turns out that there was not really so much arrears of rent due, the tenant never has had the opportunity, which the law gives him, to pay within fifteen days that which he is liable to pay as arrears of rent.

The result is, that we must set aside the decree of the Court below, and we must make the decree which the Court below ought to have made. There will be a decree as for arrears of rent for the amount found to be due, minus the rent of those two bigas, and for ejectment from all but those two bigas. And if that amount, together with interest and costs in proportion, be paid into Court within fifteen days from the date of the decree, execution of the decree for ejectment will be stayed. There will also be a further decree for the amount fixed by the Court below in respect of those two bigas; but that being arrear of rent will not be included in the decree which directs the defendant to pay the money into Court (1).

Appeal allowed.

(1) The plaintiff withdrew his claim for ejectment, and a decree was made for the arrears, with interest and costs.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

BHIMUL DOSS, *alias* LALL BABOO (ONE OF THE DEFENDANTS) *v.* CHOONEE LALL (PLAINTIFF).*

1877 *April* 10.

Hindu Law—Inheritance—Brother—Nephew—Mitakshara—Joint undivided Family.

Where, in an undivided Hindu family living under the Mitakshara law, a person dies without leaving issue, but leaving a brother, and a nephew the son of a predeceased brother, the latter is not excluded from succession by the former.

Debi Parshad v. *Thakur Dial* (1) followed.

THIS case was referred by Garth, C. J., and Mitter, J., to a Full Bench in the following order of reference :—

GARTH, C. J.—The plaintiff and the defendant, special appellant, are related to each other as first cousins, and the following family tree will materially assist the Court in understanding the question of law raised between them :—

BANEE PROSAD.

1 Baboo Lall, died 1280 (1873).	2 Pirtum Lall, died 1269 (1862).	3 Futteh Chand, died 1244 (1837).	4 Janbhunjun, died 1276 (1869).	5 Hurro Lall, died 1273 (1866).	6 Bhoku Lall, died 1277 (1870).
	CHOONEE LALL, *plaintiff.*			DOSANUND, *defendant.*	BHIMUL LALL, *alias* LALL BABOO, defendant, *special appellant.*

The plaintiff's case is this. The six sons of Banee Prosad lived as members of a joint Hindu family till the death of the fourth son, Janbhunjun Doss, which took place in 1276 (1869); Baboo Lall, Futteh Chand, and Janbhunjun died without issue, and upon these facts the plaintiff contends that he is entitled to one-third share of the family property.

* Special Appeal, No. 770 of 1875, against a decree of A. J. Elliot, Esq., Judge of Zilla Shahabad, dated the 18th of February, 1875, affirming a decree of Moulvi Mahomed Nurul Hossein, Munsif, Subordinate Judge of that district, dated the 21st of September, 1874.

(1) I. L. R., 1 All., 105.

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The respective years of death of the several sons of Banee Prosad as given in the above tree being not disputed, the defendant, special appellant, contends that the plaintiff's father, Pirtum Lall, having predeceased Janbhunjun, the plaintiff is not entitled to the one-third share of the family property which he claims. The date of separation was disputed in the Courts below, but it has been found as a fact that it took place after the death of Janbhunjun. The defendant, special appellant, contends that, on the death of Janbhunjun, his interest in the joint family property devolved upon the surviving brothers Baboo Lall and Bhoku Lall alone, to the exclusion of the plaintiff and Dosanund, sons of Pirtum Lall and Hurro Lall, who had predeceased Janbhunjun.

The contention of the plaintiff on the other hand is, that, on Janbhunjun's death, his interest in the joint family property passed to all the surviving members of the joint family. This contention is supported by a Full Bench decision of the Allahabad High Court in the case of *Debi Parshad* v. *Thakur Dial* (1), and also apparently by an important passage which occurs in the judgment of the Privy Council in the well-known Shivagunga case, upon which the above Full Bench decision appears mainly to be founded.

We entertain grave doubts whether the passage in the judgment of the Privy Council justifies the decision of the Allahabad High Court, and whether that passage is in accordance with the Mitakshara law; and as the question raised is one of great importance, and of very general application, we think it right to refer it to a Full Bench.

The question referred is, whether, in an undivided Hindu family governed by the Mitakshara law, if a brother dies leaving no issue, but leaving brothers and orphan nephews, who are members of the joint family, his interest in the family property passes on his death to his surviving brothers alone, or to all the surviving members of the joint family; and in case of a partition is that the principle according to which the respective shares of the persons entitled to succeed to that interest are to be apportioned?

(1) I. L. R., 1 All., 105.

Baboo *Mohesh Chunder Chowdry* and Moonshi *Mohammed Yusuff* for the appellant.

Mr. *C. Gregory* for the respondent.

Baboo *Mohesh Chunder Chowdry.* — The simple question involved in this case is whether, in a joint Mitakshara family, a brother or a nephew is a preferable heir to the estate of a deceased. Under the Dayabhaga, no doubt, a brother would succeed. If succession in the present case is to be regulated by the usual principles which govern inheritance, the brother being nearer to the deceased would be preferred; the Mitakshara (Chap. II, s. 4, paras. 5—9) specially provides for the succession of brothers in preference to nephews. Those provisions are applicable equally to joint and separate property. The Allahabad High Court has restricted their application to separate property only, relying apparently on the case of *Katama Natchiar* v. *the Raja of Shivagunga* (1). That case, however, does not bear out the position taken up by the Allahabad Full Bench. On the contrary, it supports the present contention that the principle is the same, whether the property be joint or separate. It speaks of descent both in cases of a divided as well as an undivided family. No doubt, the Judicial Committee say that property obtained by partition comes within the category of acquired property, and acquires a separate character. But it cannot be argued on that basis that joint property which has not been subjected to partition would follow a different order of succession from property which has acquired a separate character by partition. Unless it is made out positively that there is something in the law itself by which a separate order of succession is provided for joint property, it is submitted that it should follow the same rules as in cases of separate property. The following cases were also cited: *Chowdry Chintamun Sing* v. *Mussamut Nowlukho Konwari* (2), *Mussamut Golab Koonwur* v. *The Collector of Benares* (3), *Tara Chand Ghose* v. *Pudum Lochun Ghose* (4), *Rajkishore Lahoory* v. *Gobind Chunder Lahoory* (5).

(1) 9 Moore's I. A., 539.
(2) L. R., 2 Ind. App., 263; S. C., I. L. R., 1 Calc., 153.
(3) 4 Moore's I. A., 246.
(4) 5 W. R., 249.
(5) I. L. R., 1 Calc., 27.

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Mr. *C. Gregory* for the respondent contended that the ruling in the case of *Debi Parshad* v. *Thakur Dial* (1) had definitively settled the question, that, in an undivided Hindu family living under the Mitakshara, the sons of a predeceased brother take by representation the inheritance which their father would have taken in the estate of their uncle, had he survived the period of distribution. The case of *Duljeet Sing* v. *Sheomunook Sing* (2) also supports this position; see also 2 West and Buhler, p. 34.

Baboo *Mohesh Chunder Chowdry* in reply.

The following opinion was delivered by the Full Bench:—

GARTH, C. J.—This case raises precisely the same question which was decided by a Full Bench of the Allahabad High Court in the case of *Debi Parshad* v. *Thakur Dial* (1), and we feel bound, having regard to the weight of authority, to decide in accordance with that decision, that, under the circumstances stated in the case, the interest of the deceased brother in the family property ought, in the event of a partition, to be divided between his nephew and his two brothers in equal shares.

This point was distinctly decided by the Sudder Dewany Adawlut in the year 1802 in the case of *Duljeet Sing* v. *Sheomunook Sing* (2), and Mr. Colebrooke was one of the Judges who decided it. The same rule has been laid down since by other authorities, and is recognized by the Lords of the Privy Council in the case of *Katama Natchiar* v. *the Raja of Shivagunga* (3).

We do not find any authority conflicting expressly with those decisions; and we are, therefore, of opinion that the judgment of the Lower Court is right, and that this special appeal should be dismissed with costs.

Appeal dismissed.

(1) I. L. R., 1 All., 105. (2) 1 Sel. Rep., 59.
(3) 9 Moore's I. A., 539, at p. 611.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS *v.* HALODHUR POROE AND OTHERS.*

1877
May 7.

Penal Code, s. 277—*Public Spring—Reservoir.*

The words "public spring or reservoir" used in s. 277 of the Indian Penal Code do not include a public river. The strewing of branches in a river for fishing purposes *held*, therefore, to be no offence under that section.

THE accused and six other fishermen were tried summarily under s. 227 of the Criminal Procedure Code by the Deputy Magistrate of Jhanedah, in the district of Jessore, for voluntarily corrupting the Nobogunga river by strewing branches therein for fishing purposes. The offence was laid under s. 277 of the Indian Penal Code. The accused were all found guilty and fined respectively.

The defendants thereupon petitioned the High Court.

MARKBY, J.—I think we must hold that this is not a case under s. 277 of the Indian Penal Code. The water which is said to have been fouled was certainly not the water of a reservoir, nor, in my opinion, was it the water of a "public spring." The judgment of the Magistrate shows that it was the water of the river Nobogunga. I do not think by the use of the words "the water of any public spring" the Legislature intended to include the water of a river. On that ground we quash the order and direct the fine, if paid, to be refunded.

Conviction quashed.

* Criminal Motion, No. 68 of 1877, against the order of W. G. Deare, Esq., Deputy Magistrate of Jhanedah, dated the 5th January, 1877.

Before Mr. Justice Ainslie and Mr. Justice McDonell.

1877
June 19.

THE EMPRESS *v.* DEDAR SIRCAR.*

Security for good behaviour—Criminal Procedure Code (Act X of 1872), s. 505.

On a requisition from the High Court a Magistrate is bound to state the grounds upon which he fixed the amount of security.

A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security.

UNDER s. 506 of the Criminal Procedure Code, the Magistrate of Dinagepore required nine persons to furnish "two respectable and sufficient sureties for their good behaviour, each in the sum of Rs. 1,000," and in the case of another person, Dedar, in the sum of Rs. 5,000. The aggrieved parties petitioned the High Court, whereupon Markby and Prinsep, JJ., called upon the Magistrate to state the grounds or information on which the amount of the respective securities had been fixed. The Magistrate furnished the information required, but took occasion to question the authority upon which he had been called upon to state the grounds upon which he has fixed the various amounts. The case ultimately came before Ainslie and McDonell, JJ.

Baboo *Indro Nath Banerjee* for the petitioner.

The Junior Government Pleader Baboo *Jugadanund Mookerjee* for the Crown.

The judgment of the Court was delivered by

AINSLIE, J.—We think that, under the circumstances stated by the Magistrate, it is not desirable that the Court should interfere in the present case. In the 4th paragraph of his letter the Magistrate expresses a doubt whether the High Court is competent to call upon him to state the grounds upon which

* Criminal Motion, No. 64 of 1877, in the matter of the decision of E. V. Westmacott, Esq., Magistrate of Dinagepore, dated the 20th January, 1877.

he fixed the amount of security. With reference to this, we desire to call his attention to a ruling of the Madras High Court, at page 450 of Mr. Prinsep's edition of the Code of Criminal Procedure (1), an expression of opinion in which we entirely concur. It is there said, "The imprisonment is provided as a protection to society against the perpetration of crime by the individual, and not as punishment for a crime committed, and being made conditional in default of finding security, it is only just and reasonable that the individual should be afforded a fair chance at least of complying with the required conditions of security." If the Magistrate declined to furnish a statement of the grounds upon which he fixed the amount of security, this Court would have been unable to say that he had fixed it on just and reasonable grounds, and probably the result would have been that we should have felt bound to modify the order as *primâ facie* unreasonable and unsupported by anything before us.

ORIGINAL CIVIL.

Before Mr. Justice Macpherson.

ROYCHURN DUTT *v.* AMEENA BIBI.

1877
May 21 & 23.

Sheriff—Right to Poundage—Satisfaction of Decree after attachment, but before sale.

Certain immoveable property of the defendant was attached in execution of a decree which had been partly satisfied by the proceeds of a previous sale in execution. Before any proceedings for sale were taken under the attachment, the defendant paid the balance and satisfied the plaintiff's claim in full. *Held*, that the Sheriff was entitled to poundage upon the amount so paid in satisfaction of the debt, and satisfaction of the decree was ordered to be entered, and the attachment withdrawn, subject to the payment of such poundage.

THIS was an application on notice on behalf of the defendant in the above suit for an order that satisfaction of the decree

(1) 4 Mad. H. C. Rep., App., 44.

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made in the suit be entered on the record, and that the attachment of the properties of the defendant be withdrawn without payment of poundage to the Sheriff.

The decree in the suit, which was on a mortgage, was made on the 28th of June, 1875, and default having been made in payment of Rs. 29,991, the sum found due by the Registrar on taking the accounts, the mortgaged properties were sold, and a sum of Rs. 17,070 was received by the plaintiff in part satisfaction of his decree and costs. For the realization of the balance a prohibitory order was issued on 29th June, 1876, under which certain immoveable property of the defendant was attached by the Sheriff of Calcutta. On the 10th May, 1877, before any proceedings for sale were taken by the plaintiff, the defendant paid the balance and satisfied the plaintiff's claim in full.

The Sheriff claimed his poundage on the whole debt, but his right thereto was disputed by the parties, and the question was brought before the Court on motion.

Mr. *Stokoe* for the defendant, in support of the application, referred to s. 201, Act VIII of 1859, *In the matter of the Bombay Joint Stock Corporation; In re Sheriff of Bombay* (1), *Rex* v. *Robinson* (2), and *Vinayak Vasudev* v. *Ritchie Stewart* (3); and contended that the Sheriff was only entitled to poundage on the amount actually levied by him in execution, not on the amount afterwards received from the defendant in satisfaction of the debt.

Mr. *Jackson* for the Sheriff contended, that the Sheriff was entitled to poundage on the whole amount of the debt; his right accrued on the execution of the writ. He referred to *Miller* v. *Abbott* (4), *Miles* v. *Harris* (5), and to the following cases in which orders had been made on the present question in favour of the Sheriff,—*Nittianund Paul* v. *Nobin Chunder Ghose*, 10th July, 1876; *In re Brojonath Chowdhry*, 22nd May, 1875; *In re Jodunath Shaw Chowdry*, 29th July, 1876; *Kherodmony Dossee* v. *Nobin Chunder Ghose*, 14th December, 1875; *Indra*

(1) 6 Bom. H. C., O. C., 22.
(2) 2 Cr. M. & R., 334.
(3) 4 Bom. H. C., O. C., 139.
(4) 1 Str. Mad. Cas., 182.
(5) 12 C. B., N. S., 550.

Chand Johurry v. *Suruth Chunder Ghose*, 6th July, 1876; and *Pearson* v. *Madhub Chunder Ghose*, 18th April, 1872 (1).

Mr. *Stokoe* in reply.

Cur. adv. vult.

(1) This case came before the Court (Macpherson, J.) on the 18th of April, 1872, in the form of a motion, objection being taken to the following ruling of the taxing officer of the Court in the taxation of the costs of the suit:

"In this case the Sheriff's claim to poundage on the amount endorsed on the warrant of arrest, which was executed by him against the defendant Madub Chunder Ghose in execution of the decree in this suit, is contested on the ground that no portion of the amount endorsed on the writ was levied, the defendant having been discharged from custody by the Court under the provisions of s. 273 of Act VIII of 1859 and s. 8 of Act XXIII of 1861. In the table of fees the entry as to poundage is:— 'Poundage on sums levied under a writ of execution against the effects, or for taking the defendant in execution, for the first 1,000 rupees at 5 per cent., and for the rest at 2½ per cent.' It refers to two classes of execution, namely, execution against the effects, and execution against the person. The word 'levied,' as used in the entry, applies only to executions of the former class. It stands connected with the words 'under a writ of execution against the effects,' but not with the words which follow, 'for taking the defendant in execution.'

"The sheriff has always, both before and since the establishment of the High Court, charged poundage as if his right thereto had accrued on his executing the warrant of arrest, irrespective of the ultimate result as regards the realization of the amount endorsed on the writ.

"In the table of fees of the High Court of Bombay the entry as to poundage is 'poundage on every debt levied by execution, on every sum not exceeding 1,000 rupees, 5 per cent., on every other sum exceeding Rs. 1,000, 2½ per cent.' There can be no question that the word 'levied,' as used in that entry, applies to executions generally. Yet, in deciding at Bombay the question, now raised for the first time here, it was held by Sir Richard Couch (then the Chief Justice of the High Court at Bombay) that, in order to satisfy the word 'levy,' it is not necessary that the debt should have been paid, and that the words in the table of fees must be construed as entitling the Sheriff to poundage upon his executing a warrant of arrest in execution of decree — *Vinayak Vasudev* v. *Ritchie Stewart* (1). The facts of that case are similar to those in the present case, except that, whereas at Bombay the practice of claiming poundage, when the party under arrest had been liberated without any part of the debt being paid, was discontinued by the Sheriff after the year 1859, the same practice here has continued uninterruptedly up to the present time; and except also that the

(1) 4 Bom. H. C., O. C., 139.

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ROYCHURN DUTT v. AMEENA BIBI.

The Court was of opinion that the Sheriff was entitled to poundage upon the sum actually compromised for, and granted the application subject to such payment of poundage to the Sheriff. The Sheriff to have the costs of the application.

Attorney for the defendant: Mr. *Gillanders*.

Attorney for the Sheriff: Mr. *Morgan*.

entry as to poundage in the Bombay table of fees is less favorable to the claim of the Sheriff than the corresponding entry in the table of fees of this Court.

"I shall follow the decision in that case, but inasmuch as that decision is not binding on this Court, it will be open to the plaintiff to have the question decided by this Court on any objection which he may be advised to make to my taxation."

Mr. *Marindin* appeared in support of the application.

Notice of the application was given to the Sheriff, but he did not appear.

Mr. *Marindin* contended that nothing having been levied, the Sheriff was not entitled to poundage; the bringing up of the debtor was not a levying of the debt, as under certain circumstances the debtor could be discharged by the Court. Under the table of fees in the old Supreme Court, it was held that the Sheriff was entitled to poundage immediately he took the debtor in execution: See *Miller* v. *Abbott* (1). But the position of the Sheriff has been entirely altered since the passing of Act VIII of 1859: see *In re Sumbhoo Chunder Holder* (2). This alteration was not brought to the notice of the Bombay Court, and that decision consequently loses a great deal of its weight. The words moreover of the rules relating to fees at Bombay are different from those at Calcutta, which further distinguishes the case. The Calcutta rule—see Broughton's Civil Procedure Code, 741,—is also different from the old rule: see Smoult and Ryan's Rules and Orders, vol. ii, p. 234. The Sheriff does not act now as the agent of the parties, but as the officer of the Court; his duty is only to execute the warrant of the Court, and either bring the debtor before the Court at once, or make him over to the superintendent of the jail. That officer was formerly the Sheriff, so that then the debtor remained in the custody of the Sheriff, who was responsible. In his present position he is not responsible, at any rate when he has delivered the debtor to the superintendent of the jail. By Act XII of 1865, s. 3, no one is to be committed to the custody of the Sheriff, nor are writs for arrest to be issued to him. This is re-enacted by Act XII of 1867.

MACPHERSON, J.—I do not see that the difference between the old and the new rules would justify me in putting a different construction on the new rule to that which was always put on the old one. I think I must decide as the Bombay Court did. The order of the taxing officer is therefore upheld.

(1) 1 Str. Mad. Cas. 182.

(2) Bourke's Rep., 59.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

CHUNDER MOHUN ROY AND OTHERS (DEFENDANTS) *v.* BHUBON MOHINI DABEA (PLAINTIFF).*

1877 *April* 18.

Limitation—Petition in Formâ Pauperis—Act IX of 1871, *s.* 4, *explanation—Act VIII of* 1859, *s.* 308.

A put in a petition to sue *in formâ pauperis* for possession of certain foreclosed property within the time specified by the Limitation Act, but on her failing to appear on two occasions when called upon to give evidence of her pauperism, the case was struck off so far as the application to sue *in formâ pauperis* was concerned. At the instance of *A* the case, however, was again reopened, and a date fixed for her appearance. Two days prior to this date, but at a time beyond the limit fixed by the Limitation Act, *A* put in a petition asking that the petition which she then made to have her suit proceed as an ordinary suit might be joined with her application to sue *in formâ pauperis*, and the suit be duly tried in the ordinary way. She also paid in the regular amount of stamp duty for an ordinary suit. On the point of limitation, *held*, that the plaint must be considered as filed not on the day of filing the application to sue *in formâ pauperis*, but on the day on which the stamp duty was paid and application made to have the suit tried in the ordinary way.

The explanation to s. 4 of the Limitation Act only applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in formâ pauperis* is granted, and the application is numbered and registered as a suit (1).

SUIT for possession of foreclosed lands. The plaint stated that three of the defendants, Modhu Sudun, Madhab Chunder, and Seta Nath Roy, by a deed of conditional sale, dated the 24th September, 1850, sold to the mother of the plaintiff the properties, the subject of the present suit, for a consideration of Rs. 200, on a verbal condition that the said properties should be released on payment of the purchase-

* Special Appeal, No. 1333 of 1875, from the judgment of the Second Subordinate Judge of Burdwan, reversing a decree of the Munsif of that district, dated 1st December, 1874.

(1) See *Skinner* v. *Orde*. I. L. R., 1 All., 230.

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money within four years. On failure by the defendants to pay the money within the said period, the mother of the plaintiff foreclosed the mortgage on the 7th February, 1860. Subsequently, the father of one of the defendants in the present case intervened on the allegation that part of the lands foreclosed belonged to him by purchase. The foreclosure suit was, thereupon, struck off on the 26th June, 1861; leave, however, was reserved to the then plaintiff to bring a regular suit. On the 6th February, 1873, the present plaintiff presented a petition to be allowed to sue *in formâ pauperis* for the possession of the said lands, on the ground that her mother, the original mortgagee, had granted the said lands to the petitioner in November, 1866. The petitioner was thereupon ordered to appear and depose as to her pauperism on the 1st of March, but she failed to appear; and again on the 15th of June she was ordered to appear, but she again failed to put in an appearance before the Court. The case was thereupon struck off the file. Subsequently the petitioner applied for a review, which was granted, and she was ordered to appear on the 9th of August for the purpose of deposing to her pauperism. Before that date, on the 7th of August, she paid stamp duty sufficient for a suit in the ordinary form, whereupon the application was registered for hearing as an ordinary suit.

For the defendants it was contended that the suit was barred.

The Court of first instance held that the suit was instituted on the date when the plaintiff paid the stamp for the suit, and not from the date of filing the original petition to sue *in formâ pauperis*. The suit was, therefore, barred.

On appeal the Judge remanded the case, being of opinion that the plaintiff's claim would not be barred if she was actually a pauper on the 6th of February, 1873, and that the plaintiff had had no sufficient opportunity afforded her to prove this fact.

The Munsif, therefore, took fresh evidence on the point, and decided the question of limitation in favour of the defendant: he also found for the defendant on the facts.

The lower Appellate Court reversed the decision of the Munsif on the merits, but expressed no opinion on the question of limitation.

From this decision the defendant appealed to the High Court.

Babu *Hori Mohun Chucherbutty* for the appellants.

Babu *Nolit Chunder Sen* for the respondent.

The following judgments were delivered:—

MARKBY, J.—We think on the face of these proceedings we must hold that the suit is barred by limitation. The mortgage is dated the 24th of September, 1850; the default was made on the 24th of September, 1854; notice of foreclosure issued on the 7th February, 1860. It is not shewn on what date the notice was served, but the foreclosure must have become absolute sometime before the 26th June, 1861, because the case was struck off on that date with permission to bring a regular suit, as appears from the plaint. Therefore, the title of the plaintiff must have become absolute at least as early as the 26th June, 1861, and the suit would be barred on the 26th June, 1873.

Now, on the 6th February, 1873, the plaintiff presented a petition to be allowed to sue *in formâ pauperis* to recover possession. She was ordered to appear on the 1st March, and she did not do so. She was again ordered to appear on the 15th June, and she did not do so; and the case was struck off so far as the application to sue *in formâ pauperis* was concerned. The matter was reopened, and she was ordered to appear on the 9th August. On the 7th August, that is two days prior to the date on which she was ordered to appear, she put in a petition asking that the petition which she then made might be joined with her application to sue *in formâ pauperis*, and a number given to the suit, and the suit tried on the civil side of the Court. With that petition she paid in the regular amount of stamp fees as in an ordinary suit. The order was that the suit should be registered and proceeded with in the usual way. The question we have to decide is, whether we are to reckon the plaint in this suit as filed on that date, namely on the 7th August, or whether the plaintiff can take advantage of the clause in the explanation of s. 4 of the Limitation Act, which says that a suit in the case of a pauper is instituted when his application for leave to sue as a pauper is filed. It is, I think, clear that that provision in favour of a pauper only

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applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in formâ pauperis* is granted and the suit is numbered and registered. In that case, by the provisions of that section, the application becomes the plaint in the suit, and the suit is considered as having commenced when the petition, which has subsequently been turned into a plaint, was filed. But in this case, in consequence of the second application made by the plaintiff herself, enquiry into her pauperism was stopped, and she elected to proceed in this case as an ordinary suitor and not as a pauper. I think we must take it that she having put in that petition stood merely in the same position as if she had filed her suit on that date. The District Judge seems to think that she will be entitled to the benefit of the explanation of s. 4 of the Limitation Act, if she was in fact a pauper when the original application to sue as a pauper was filed. I think he had no right to reopen that matter at all when it was closed on the application of the plaintiff herself. In order to give her the benefit of that explanation it was necessary that her application should be granted, in which case only her original application for leave to sue as a pauper could be treated as a plaint. Therefore, the date on which the present suit was filed being the 7th August, 1873, and the date on which she was entitled to possession being on some day prior to the 26th June, 1861, the suit is necessarily barred. The decision of the Court below will be reversed and the suit dismissed with costs.

PRINSEP, J.—I wish to add only a few words. The decision of this Court will proceed on the point of limitation on the facts which are most favourable to the plaintiff. The point now under decision depends entirely upon the question as to whether the application to sue as a pauper is to be treated as a plaint. The application can be treated as a plaint only when the leave to sue as a pauper has been granted. In its present state, it is, therefore, incomplete. It is only made complete so far as the present suit is concerned by the payment of fees; and, therefore, it became a plaint on the 7th August, 1873, on which date it was clearly barred.

Appeal allowed.

Before Mr. Justice Markby and Mr. Justice Prinsep.

RAGHUMONI AUDHIKARY (ONE OF THE DEFENDANTS) *v.* NILMONI SINGH DEO (PLAINTIFF).*

1877
April 23.

Limitation— Act IX of 1871, *Sch. II, art.* 60—*Money obtained by Collusion and Fraud.*

A suit for the recovery of money obtained by fraud and collusion is a suit for money received by a defendant for the plaintiff's use, and, therefore, under art. 60 of the second Schedule of Act IX of 1871 is barred unless brought within three years of the date when the money was received.

SUIT for the recovery of Rs. 507-6. The plaint stated that one Prankisto Mitter had deposited the sum claimed in the collectorate in the name of the plaintiff, and that the first defendant, in collusion with the second defendant, on the 13th of January, 1869, without the knowledge or consent of the plaintiff, took out the said sum of money from the collectorate. The plaint was filed on the 21st January, 1874. The defendants pleaded limitation.

The lower Appellate Court held that the suit came under arts. 48 and 90 of Act IX of 1871. The period of limitation was, therefore, to be computed from the date on which the money was demanded by the plaintiff. Such demand having been made within three years of the filing of the plaint, the suit was not barred.

Against this decision the first defendant preferred a special appeal to the High Court.

Baboos *Hem Chunder Banerjee* and *Tarruck Nath Sen* for the appellant.

Baboo *Bhobany Churn Dutt* for the respondent.

The judgment of the Court was delivered by

MARKBY, J.—It seems to us that the decision of the lower Appellate Court is wrong. The suit is brought to recover a

* Special Appeal, No. 1610 of 1875, from the decision of J. S. Davies, Esq., Judicial Commissioner of Manbhoom, dated the 29th March, 1875.

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specific sum of money which the plaintiff says the defendant No. 1, in collusion with defendant No. 2, without his knowledge and consent, had obtained from the collectorate. The defendants pleaded limitation. The Court below thinks that the case is governed either by art. 90 of the 2nd schedule of the Limitation Act or by art. 48. Art. 90 provides for a suit by a principal against his agent for moveable property received by the agent and not accounted for. The plaintiff does not sue the defendant as his agent; he does not admit that the defendant was his agent. On the contrary, he denied that the defendant was his agent, and the Court below does not find that the defendant was so. Therefore it cannot possibly be brought under that head. Art. 48 clearly provides for a case in which a suit is brought to recover moveable property acquired by means of a criminal offence. The words used are: "For moveable property acquired by theft, extortion, cheating, or dishonest misappropriation, or conversion," following exactly the language of the Penal Code. Now the plaintiff in this case does not allege that the defendant committed either of those criminal offences. He does not sue the defendant on the ground that he had committed a criminal offence, but that by means of some fraud in combination with another person he got possession of the plaintiff's money. Now, that is exactly the case which would be covered by art. 60 of the schedule of the Limitation Act, if we read that article as we think we ought to do in connection with the English law. A suit for money received by the defendant for the plaintiff's use evidently points to the well-known English action in that form, and it appears from two cases quoted in Bullen and Leake on Pleading, 3rd edition, page 47 (1), that that form of action is appropriate to the recovery of money under such circumstances as these. It is said there that where the defendant has wrongfully obtained the plaintiff's money from a third party, as by a false pretence, it may be recovered in this Court. So, where defendant wrongfully obtained from the plaintiff's debtors the

(1) The cases alluded to by the learned Judge are *Litt* v. *Martindale*, 18 C. B., 314; and *Andrews* v. *Hawley*, 26 L. J., Ex., 323.

payment of their debts under a fraudulent misrepresentation that he had an authority to collect them, the plaintiff was held entitled to recover the amount under this count. We think, therefore, that art. 60 of the 2nd schedule of the Limitation Act contains the law which ought to govern this case, and that the limitation ought to run not from the time when the money was demanded but from the time when the money was received. The money in the present case was received so long ago as January, 1869, and this suit was not brought until 1874. Therefore the claim is clearly barred. The decision of the lower Appellate Court is reversed, and the suit dismissed with costs in all the Courts.

Appeal allowed.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Birch.

HENDRY (ONE OF THE DEFENDANTS,) *v.* MUTTY LALL DHUR AND OTHERS (PLAINTIFFS).*

1876
March 31.

Sale in execution of decree against representative of deceased Mahomedan—Mahomedan Law—Debts—Purchaser of share of estate, Right of.

B R, a Mahomedan, had incurred debts for repairs to a house of which he owned an 8-anna share, and after his death his daughter *S*, who was entitled to a 5-anna share of his estate, and who had taken charge of his property and obtained a certificate under Act XXVII of 1860, directed further repairs to be done to the estate. The debts then incurred by *B R* and *S* not having been paid, the creditor brought a suit against *S*, as representing her father's estate, to recover them, and having obtained a decree, the house was sold in execution thereof, and purchased by *H* in May 1874. *B R* at his death left also a sister, who was entitled to a 3-anna share of his estate, but who had been for some years absent on a pilgrimage to Mecca. On her return she in January, 1874, sold her interest in the house to *M*. In a suit by *M* against *S* and *H* for possession of the share so purchased by him—*Held*, that *S* did not represent the whole estate of *B R*, and the share purchased by the plaintiff did not pass under the execution sale to *H*; the plaintiff, therefore, was entitled to recover.

THIS was a suit to recover possession after partition of a share in a certain dwelling-house and land in Sealdah, which

* Special Appeal, No. 1200 of 1875, against a decree of Alex. J. Maclean, Esq., Judge of Zilla 24-Pergannas, dated the 4th of June, 1875, reversing a decree of Baboo Mohendro Nath Bose, First Subordinate Judge of that district, dated the 5th of April, 1875.

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the plaintiff had purchased under a kobala, dated 2nd January, 1874.

One Buzloor Rohim died on 13th January, 1871, leaving a daughter Surfurunnissa Begum, a widow Fatima Khanum, and a sister Sadurunnissa. Buzloor Rohim, at the time of his death, was owner of an 8-anna share in the house and land in Sealdah; the other 8-anna share belonged at the time of this suit to one Khodejannissa, who acquired it by purchase. Of the 8-anna share owned by Buzloor Rohim, Surfurunnissa was entitled to a 5-anna share (to a 4-anna share by right of inheritance from Buzloor Rohim and to a 1-anna share under a kobala executed in her favor by Fatima Khanum), and the remaining 3-anna share belonged to Sadurunnissa Bibi. During his lifetime and at his death Buzloor Rohim was indebted to Messrs. Anderson, Wallace, and Co. for repairs done by them, and after his death they filed a suit against Surfurunnissa Begum, who had obtained a certificate and taken charge of Buzloor Rohim's property, styling her the daughter and representative of Buzloor Rohim, to recover that debt, and a further sum for repairs which had been executed at Surfurunnissa's direction since Buzloor Rohim's death. That suit was undefended, and a decree was made against Surfurunnissa, in execution of which Surfurunnissa's interest in the house and land was sold, and purchased by certain persons—Hendry and Hubbard—in May, 1874. For some time before Buzloor Rohim's death, Sadurunnissa was absent on a pilgrimage to Mecca, and did not return till 1873. In January, 1874, she sold her interest in the dwelling-house and land to the plaintiff, who, possession being refused him, accordingly brought this suit for possession of his vendor's 3-anna share, making Khodejannissa, Hendry, Hubbard, and Surfurunnissa, defendants.

The defendant Hendry defended the suit and submitted in his written statement that the decree in execution of which he and Hubbard purchased was passed against Surfurunnissa, as representative of Buzloor Rohim; that the interest of the latter passed by the sale, and that, consequently, nothing was left for the plaintiff's vendor to transfer, and the plaintiff had no title on which to found his suit. The Subordinate Judge, referring to

the case of *Ishan Chunder Mitter* v. *Buksh Ali Soudagur* (1), was of opinion that the right and interest of Buzloor Rohim passed by the sale in execution of the decree in the suit against Surfurunnissa, who had been sued as his daughter and representative. He, therefore, dismissed the suit.

The Judge on appeal was of opinion that the present case was distinguishable from that referred to by the Subordinate Judge, inasmuch as the debt was principally incurred after Buzloor Rohim's death; and as Sadurunnissa was not a party to the suit against Surfurunnissa, the estate of the deceased was not fully represented. He, consequently, held that the sale in execution against Surfurunnissa could not bind the share of the estate to which Sadurunnissa was entitled, and gave the plaintiff a decree for the share sued for.

The defendant Hendry preferred a special appeal to the High Court, on the ground (among others) that by the sale in execution all the rights of Buzloor Rohim became vested in him, and Sadurunnissa, as the sister and one of the heirs of Buzloor Rohim, could not have any rights in the property in dispute as heir till the debts of the estate were paid.

The *Advocate-General*, offg. (Mr. *Paul*) for the appellant.

Baboo *Mohini Mohun Roy* for the respondents.

The judgment of the Court was delivered by—

GARTH, C. J.—In this case the plaintiff claims a three-sixteenth share in a dwelling-house at Sealdah, one half of which is admitted to have belonged to the late Buzloor Rohim, who died in 1871.

Buzloor Rohim, in his lifetime, had employed Anderson, Wallace, and Co., in Calcutta, to do some repairs to the house; after his death his daughter Surfurunnissa Begum, who was entitled to five-sixteenths of the whole property, employed them to do further repairs. The price of these repairs not having been paid, Anderson, Wallace, and Co. brought an action

(1) Marshall, 614.

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against Surfurunnissa Begum, as representing her father's estate, to recover the sum due to them; and having obtained a decree, the house was sold in execution under the decree, and was purchased by the defendants Hendry and Hubbard. Meanwhile, a sister of Buzloor Rohim, Sadurunnissa Bibi, who had been for some time past on a pilgrimage to Mecca, and who was entitled to a three-sixteenth share of the property, returned, and she sold her interest to the plaintiff, who brings this suit to establish his right, insisting that the three-sixteenths which he purchased could not legally be sold, and were not in fact sold to Hendry and Hubbard under the decree.

The defendants contend that Surfurunnissa Begum represented the whole estate of Buzloor Rohim, and that, therefore, his sister's share was liable for the repairs and was properly sold under the execution. The learned Judge in the Court below has found that Surfurunnissa Begum was not legally authorized to represent the whole estate of her father, and that, consequently, the decree and the execution sale which took place under it only affected her five-sixteenths of the property.

Under these circumstances the three-sixteenth share which belonged to Sadurunnissa Bibi being duly conveyed to the plaintiff, became his property, and the learned Judge in the Court below was, in our opinion, perfectly right in making a decree in his favor.

The appeal will, therefore, be dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

THE EMPRESS *v.* DWARKANATH CHOWDHRY AND ANOTHER.* 1877 *Jany.* 22.

Stamp Act (XVIII of 1869), s. 29, and Sch. II, art. 38—Instrument of Transfer—Prosecution by Collector—Intention to evade payment of stamp duty.

The accused was prosecuted under Act XVIII of 1869, s. 29, for executing a document on insufficiently stamped paper. The document recited that, "whereas *A* and *B* have sold to me 2 gandas 3 cowries of land under a kobala dated the 9th of Jeyt, 1283, in lieu of a consideration of Rs. 695, and whereas I have returned to the vendors in all 4 cottas of land worth about Rs. 25, and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me the purchaser; hence I have executed this chitti by way of conveyance or deed of exchange, which may be of service when required." This document bore a stamp of eight annas, and it was executed only by the accused and presented by him for registration. *Held*, that the document was an instrument of transfer within the meaning of art. 38, Sch. II, Act XVIII of 1869. *Held* also, that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider whether a person prosecuted under s. 29, Act XVIII of 1869, had any intention to defraud by evading payment of stamp duty.

THE accused Dwarkanath Chowdhry employed the accused Chotay Lall, a mooktear and revenue agent of the Darbhangah Court, to prepare for him a document which was to be registered in the Darbhangah Sub-Registrar's office. Chotay Lall, accordingly, prepared the document, and Dwarkanath executed it and presented it for registration. The document bore a stamp of eight annas. It recited that "whereas Inderman Chowdhry and Mon Chowdhry, sons of Baktwar Chowdhry, residents and shareholders and maliks of mouzah Pauchole

* Reference in Criminal Motion, No. 1112 of 1876, by Mr. Justice Ainslie and Mr. Justice Morris, dated the 6th September, 1876.

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Kris, pergannah Ramchowand, have sold to me 2 gandas 3 cowries, being a quarter share of 11 gandas 2 cowries of the entire 16 annas of a certain estate under a kobala dated 9th Jeyt, 1283, F. S., in lieu of a consideration of Rs. 695; and whereas out of that share covered by the said deed of sale I have returned to the vendors in all 4 cottas of land worth about Rs. 25; and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them situated in mouzah Pauchole Kris, pergannah Ramchowand aforesaid, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me the purchaser. Hence I have executed this chitti by way of awazanama, or deed of exchange, which may be of service when required." The document was signed only by Dwarkanath Chowdhry. The document being found to be insufficiently stamped was impounded by the Sub-Registrar and sent by him to Mr. A. P. Macdonell, the Officiating Magistrate, in his capacity of Collector, by whom the accused were prosecuted under s. 29 of the Stamp Act, XVIII of 1869. The defence of Chotay Lall was, that he merely copied out the document from a draft, and was unaware at the time that the paper was insufficiently stamped, and that he could not be convicted under s. 29. Dwarkanath stated that he did not know what stamp was necessary, and that he had no intention to defraud the Government.

The Deputy Magistrate, Baboo Gobind Mohun Ghose, acquitted Chotay Lall on the ground that he could not be legally convicted under the section. As to Dwarkanath, he referred to the Government order, 2857 of 4th December, 1875 (1), and held that proof of fraudulent intention was unnecessary, and the offence was complete when the terms of s. 29 were contravened, and it was no defence to say there was no intention to evade the law. Dwarkanath was, accordingly, convicted and sentenced to pay a fine of Rs. 20. The Officiating Magistate was of opinion that Chotay Lall had been illegally acquitted, and that he ought to have been found guilty of 'making'

(1) 15 B. L. R., Rev. Cir., 59.

the document under s. 29 of Act XVIII of 1859. He, therefore, referred the case to High Court.

The case came before Ainslie and Morris, JJ., who referred it for the orders of the Chief Justice, with the following remarks:

AINSLIE, J.—The Officiating Magistrate of Darbhangah (who is also the prosecuting Collector) has made a reference to this Court in respect of the acquittal of Chotay Lall, which he holds to have been illegal. As to this it is sufficient to say that unless the Government sees fit to appeal against the sentence of acquittal under s. 272 of the Code of Criminal Procedure, this Court cannot interfere in any way.

BENGAL SECRETARIAT LIBRARY.

The record has been sent up, and on inspecting it several questions of considerable importance appear to arise; and as the propriety of the conviction of Dwarkanath depends upon the solution of the first two of these questions, it appears to us necessary to consider them.

In the first place there is the question whether the instrument on which this prosecution is founded is an instrument of transfer within the meaning of art. 38, Schedule II of the Stamp Act, or whether that article is not restricted to instruments by which a complete transfer binding on all parties thereto is effected. In the present case the instrument is only executed by Dwarkanath Chowdhry and not by Inderman and Mon Chowdhry, the other parties to the alleged exchange, nor are the latter in any way bound by it.

Secondly, there is the question whether a Magistrate is not bound to consider the intention of the persons prosecuted. There is no evidence against Dwarkanath of an intention to defraud the Government, and he states in his answer that he had no such intention, and believed that the instrument was properly stamped as a conveyance of property of less value than Rs. 50 (the value stated in it is Rs. 25). The Deputy Magistrate does not base the conviction on an inference of guilty intention deduced by himself from the facts, but on a ruling contained in an order of the Government of Bengal, No. 2857, dated 4th December, 1875 (1), to the effect that the question

(1) 15 B. L. R., Rev. Cir., 59.

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of fraudulent intention is to be considered and determined by the Collector and not by the Magistrate.

Thirdly, there is a question (which, however, rather arises upon the reference in respect of Chotay Lall, but which it would be well to express an opinion upon) whether a mooktear who writes out a fair copy of an instrument on a stamped paper of insufficient value can be said to 'make' the instrument within the meaning of s. 29 of the Act.

Considering the importance of the questions arising in this case, we think it desirable that it should be considered (as if it were a reference from the Board of Revenue under s. 41) by a Bench of at least three Judges.

Let this be submitted to the Chief Justice for orders, and notice of this order be given to the Government Pleader.

The case came on before a Bench of five Judges.

The Legal Remembrancer (Mr. *H. Bell*) for the Crown.—It is not necessary to support a conviction under the Stamp Act that the prosecution should show that the accused had an intention to evade the law. The offence under s. 29 of Act XVIII, 1869, is complete irrespective of intention: see Maxwell on Statutes, p. 80. There are many instances in which a guilty intention is not a necessary ingredient in the offence: offences for instance under the Cotton Frauds Act—*Reg.* v. *Premji Bhagvan* (1), or under the English Adulteration Act—*Roberts* v. *Egerton* (2), and under the Statute for the protection of those entitled to shoot game—*Wathins* v. *Major* (3). For the mitigation of the fine the question of intention can of course be considered, but it is for the accused to show that he had no intention to evade the law.

The opinion of the Court was delivered by—

GARTH, C. J.—On the first question raised in this reference, we are of opinion that the instrument on which this prosecu-

(1) 10 Bom. Rep., 295. (2) L. R., 9 Q. B., 494.
(3) L. R., 10 C. P., 662.

tion is founded is an instrument of transfer within the meaning of art. 38, Schedule II of Act XVIII of 1869.

On the second question we hold that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider the question whether a person prosecuted under s. 29 of the Stamp Act had an intention to defraud the Government by using a stamp of less value than that required by law.

A Collector has power to prosecute in every case coming within the provisions of s. 24, but he is not to do so unless he shall have reason to think that there has been an intent to evade payment of stamp duty. If he does prosecute, the Magistrate is bound, under the terms of s. 29, to record a conviction, provided that it is proved that there has been a making, &c., of an unstamped or insufficiently stamped instrument; but the amount of fine to be imposed is left altogether to the discretion of the Magistrate, a maximum limit only being fixed by the law. It is impossible for the Magistrate to exercise any discretion in fixing the fine, or to say what fine ought in any particular case to be imposed, unless he is at liberty to determine whether the person prosecuted has used no stamp or an insufficient one from a *bonâ fide* mistake, or from carelessness, or with intent to evade payment of the stamp duty.

It may be true that the Collector is not bound to offer any evidence of intention, or even to state the reasons which induced him to prosecute; but the question of intention is, nevertheless, one which the Magistrate is bound to consider, and he must hear the statement of the accused and any evidence which he may offer in reference to it.

A Collector may have formed his conclusion on insufficient grounds, or have ordered a prosecution without due consideration; and the Magistrate is not bound to be guided so far as the question of penalty is concerned by the mere fact of the prosecution having been instituted. The present case shows that a person who enquires as to the proper stamp to be affixed to an instrument may be misled, and so become liable to prosecution even if he makes his enquiry at a place where

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he may confidently expect correct information: for the registering officer who sent this document to the Collector has himself made a mistake as to the proper stamp to be used. He certified it as liable to a 4-rupee stamp, whereas the stamp prescribed by art. 38, Schedule II, is Rs. 16. Had the accused enquired at the Registry Office, and used a 4-rupee stamp, he would still have been liable to conviction on prosecution; but if a Collector were so unreasonable as to prosecute in such a case, a Magistrate would clearly be bound to consider the facts put forward by the defendant, and to give effect to the defence of *bona fides* by discharging the accused with a nominal fine.

A *bonâ fide* mistake may not be a *complete* defence, even if proved beyond a doubt; but it cannot be said that it is *no* defence.

As it appears that the judgment of the Deputy Magistrate was arrived at without duly considering the merits of the case before him, so much of that order as imposes a fine must be quashed. The Legal Remembrancer has stated that the Government has determined that the fine realized from Dwarkanath Chowdhry shall be refunded, whatever the merits of this case; it is, therefore, unnecessary to direct the Deputy Magistrate to reconsider his order.

The sentence passed upon Dwarkanath Chowdhry on the 4th July, 1876, by the Deputy Magistrate of Darbhangah is set aside, and it is ordered that the fine of Rs. 20 imposed on him, if realised, be refunded.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

THE EMPRESS *v.* DONNELLY.

IN THE MATTER OF THE PETITION OF DONNELLY.

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June 16, 18, *and* 21.

Criminal Procedure Code (Act X of 1872), s. 215—Discharge of Accused —Revival of Proceedings—Evidence—Magistrate—Competent Witness.

It is illegal and *ultra vires* on the part of a Magistrate to revive before himself criminal proceedings against an accused who has already been discharged under s. 215 of the Criminal Procedure Code where no further evidence is procurable than that which was before the Court on the first occasion. *Per* MARKBY, J.—When the discharge has been improper, the only proper course open to a Magistrate is to report the case to the High Court for orders, and that Court, if of opinion that the accused has been improperly discharged, will order a retrial.

Per Curiam.—A Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact. *Per* MARKBY, J.—Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad. *Per* PRINSEP, J.—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient if believed to support the conviction.

This being a proceeding under s. 297 of the Criminal Procedure Code, the Court refused to go into the evidence.

THE facts of this case were as follows. On the 7th of April Babu Hem Nath Bose, the postmaster of Howrah, preferred a complaint to the Magistrate, that a letter bearing an obliterated or twice-used stamp had been detected among the letters posted in his district. The suspicious letter was handed over to the Magistrate, who on the following day took the evidence of the postmaster and some of his subordinates. On the 13th April, Mary Donnelly, the writer of the letter, appeared on a summons, and was examined by the Magistrate. She acknowledged that the letter was in her handwriting, but denied having affixed the stamp; in explanation she stated that she had given

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a cook named Ismail two pice to purchase a stamp and put upon the letter. Robert Inglis, the stepfather of the accused, was also examined. The District Superintendent of Police, under the direction of the Magistrate, made a further investigation, and examined afresh the accused and her stepfather; two young brothers of the accused were also examined, as also the cook Ismail, who asserted that the accused has never given him any letter to post. By a letter dated the 28th of April, Mr. Pellew, the Magistrate, informed the Postmaster that, on a consideration of the evidence as taken by him, and also from the facts stated in the police report, he considered it hopeless to bring home the case to the accused, and he thereupon discharged her. The discharge order was endorsed at the back of the police report. On the next day the Postmaster in reply to the Magistrate's letter called his attention to the fact that the word 'stamped' had been written across the suspicious stamp, and asserted it as his opinion that the woman herself knowingly used the defaced stamp, and concluded by asking the Magistrate to try the case. On receipt of this letter Mr. Pellew issued a warrant for the arrest of the accused, and on the 4th of May began a second proceeding against the accused. So much of the evidence of the Postmaster as is material was as follows: "I saw clear marks of defacement not by the stamp of my office. I observed also the word 'stamped' written over the stamp. It appears to be in the same handwriting as the address. I noticed this at the time I first saw the letter. I did not mention this in my deposition, because I was not asked by the Court. I brought the letter personally to the Magistrate, and did not submit a written report. I mentioned the fact then that the word 'stamped' was written over the stamp." The former witnesses from the post office were again examined as in the first proceeding. Mr. Pellew, the Magistrate, also examined himself as a witness. His deposition was as follows:

"I recognize this letter: it was given me by the Postmaster of Howrah on the 6th or 7th April last. He personally showed me the defaced stamp, and spoke to me a few minutes on the subject. I ordered a prosecution, and took up the case myself. I opened the letter and took evidence as Magistrate. I then referred the matter to the police. Mary Donnelly, the present

defendant, was summoned and made defendant after the police inquiry. Believing that there was no evidence to prove who affixed the defaced stamp, I discharged Mary Donnelly on the 27th of April. The Postmaster then wrote a letter, No. 142, of the 29th April, pointing out that the word 'stamped' was written over the stamp, and I in consequence took up the case again. The letter has never been out of my custody since the 6th or 7th of April when first made over to me, except to show parties in the course of the trial. It has been always left locked up in my box. I don't recollect the Postmaster pointing out the word 'stamped' written over the stamp, but he may have done so."

The cook Ismail was also examined, who repeated his previous story. The Magistrate thereupon drew up a charge against the accused under s. 262 of the Indian Penal Code, and having taken the defence and examined the witnesses produced on her behalf, found her guilty of the charge, and sentenced her to two months' rigorous imprisonment. The accused appealed to the Sessions Judge of Hooghly, who, however, confirmed the decision and sentence of the Magistrate. On an application by the petitioner to the High Court, under s. 297, the record of the case was sent for from the Court below.

Mr. *Jackson* for the petitioner.—There is no evidence in this case to uphold the conviction. The conviction is also bad on the ground that the Magistrate could not appear as a witness in a case in which he was sole judge. In *Queen* v. *Mukta Singh* (1), Norman, J., has collected the English cases on this point, which are all in favor of this contention. The English law on the point only goes to the extent of permitting a Judge to be a witness in a case where he is not the only judge trying the case; Bacon's Abridgment, Tit. Evidence, p. 206; see also *Hackers' case* (2). The Magistrate further had no power to revive the prosecution against the petitioner after she had been discharged. Ss. 142 and 215 of the Criminal Procedure Code may be supposed to confer this power; but ss. 295 and 296 clearly shew that it was the in-

(1) 4 B. L. R., A. Cr., 15. (2) Kelyng's Rep., 12.

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tention of the Legislature to reserve the exercise of this power to the High Court alone. The point has already been decided in *In re Mohesh Mistree* (1). *Jint Sahoo* v. *Bheekon Roy* (2) may be referred to as supporting the opposite contention, but there Couch, C. J., points out that the Magistrate had, on the second occasion, some fresh evidence before him, which is not the fact in this case; see also *Kistoram Mohara* v. *Anis* (3).

The *Legal Remembrancer* (Mr. *H. Bell*, with him the *Junior Government Pleader*, Baboo *Juggadanund Mookerjee*) for the Crown.—In this case there was no necessity for the Magistrate to have made himself a witness. He might have taken judicial cognizance of every fact stated by him as witness. The evidence is immaterial, and there is sufficient on the record independently of the Magistrate's evidence to support the conviction. The action of the Magistrate cannot, therefore, be a ground for reversing the orders of the Lower Courts; see s. 167 of the Evidence Act. *Hurpurshad* v. *Sheo Dyal* (4) and *Kishore Singh* v. *Gonesh Mookerjee* (5) are cases in favor of the power of a Judge to examine himself as a witness. An American case, *Ross* v. *Buhler* (6), referred to by Taylor in his work on Evidence, p. 1173, seems to decide that a sole Judge cannot depose as a witness, but the author does not approve of that case; see also Best on Evidence, 3rd ed., 260. [MARKBY, J.—Mr. Best is there referring to trial by jury, and not to cases where a Judge tries the facts.] In England and America there would be no appeal from the facts. In this country, appeals are permitted; and, therefore, the same objection does not apply. Under s. 118 of the Evidence Act, a Judge is not precluded from giving evidence—*Queen* v. *Tarapersaud Bhuttacharjee* (7). [MARKBY, J.—There is no reason at all given for that decision.] The decision of Norman, J., in *Queen* v. *Mukta Singh* (8) distinctly holds that a Judge is a competent witness, and can give evidence in a case tried before himself. *Queen* v. *Bholanath*

(1) I. L. R., 1 Calc., 282.
(2) 18 W. R., Cr., 39.
(3) 20 W. R., Cr., 47.
(4) L. R., 3 Ind. App., 259, 286.
(5) 9 W. R., 252.
(6) 2 Martin, N. S., 312.
(7) N. A. Rep., 1857, pt. II, p. 83.
(8) 4 B. L. R., A. Cr., 15.

Sen (1) does not apply, because there it was held that the Magistrate had a personal interest in the case tried. No authority has been shewn making it imperative that the Magistrate should have fresh evidence before him before he can try a case a second time. The Magistrate was competent, under s. 464, to withdraw the order of discharge. The evidence on the second proceeding was given much more in detail; there was, therefore, fresh evidence sufficient to bring the case within *Hari Singh* v. *Danish Mahomed* (2). Fresh evidence was not absolutely necessary—*In re Ramjoy Mozoomdar* (3). *In re Mohesh Mistree* (4) does not apply; all the Court there ruled was that a Magistrate cannot order a subordinate Magistrate to proceed with a case under s. 142; see also *Queen* v. *Tilkoo Goala* (5), *Jint Sahoo* v. *Bheekon Roy* (6), *Kistoram Mohara* v. *Anis* (7), *Sidya bin Satya* (8). The record shows that the alleged first and second proceedings of the Magistrate were in fact one proceeding,—the second proceeding was only a continuation of the first.

Mr. *Jackson* in reply.

Cur. adv. vult.

The following judgments were delivered:—

MARKBY, J. (after shortly stating the proceedings before the Magistrate continued):—The petitioner appealed to the Sessions Judge of Hooghly, who on the 28th of May affirmed the conviction and sentence. The petitioner then applied to this Court to set aside the conviction as illegal: first, because the Magistrate had no power to revive the prosecution against the petitioner after she had been discharged; and secondly, because the Magistrate could not appear as a witness in a case in which he was the sole judge. On the argument of the case, it was also contended that there was no evidence which would support a conviction.

(1) I. L. R., 2 Calc., 23.
(2) 20 W. R., Cr., 46.
(3) 14 W. R., Cr., 65.
(4) I. L. R., 1 Calc., 282.
(5) 8 W. R., Cr., 61.
(6) 18 W. R., Cr., 39.
(7) 20 W. R., Cr., 47.
(8) Unreported, see Prinsep's Cr. Pro. Code, 5th ed., 163.

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As regards the last point, we intimated at the close of the argument for the petitioner, that there was some evidence. Of course we express no opinion whatever as to the sufficiency or otherwise of that evidence; that is a matter into which this Court does not enter upon an application of this kind, nor is it desirable to comment upon this evidence; but I may say with reference to an argument used by Mr. Jackson, that, in my opinion, that evidence does not consist solely of the comparison of handwriting made by the Magistrate.

I proceed now to examine the grounds of law taken in the petition.

With regard to the power of the Magistrate to revive proceedings against an accused person who has been discharged under s. 215, the law provides by that section that a discharge under it is not equivalent to an acquittal, and does not bar the revival of the prosecution for the same offence. By s. 142, also, any Magistrate duly empowered in any case which he is competent to try or commit for trial may, without any complaint, take cognizance of any offence which he suspects to have been committed, and may issue process to compel the suspected persons to appear. These two sections appear, no doubt, to leave the Magistrate, if properly qualified, free to revive any case he likes, whether the discharge be illegal, whether it be improper upon the evidence, whether it appears to the Magistrate that another offence has been committed than that charged, or whether fresh evidence which was not previously forthcoming has come to his knowledge. And the Magistrate could, under the sections, revive not only any case heard by himself, but any case heard by another Magistrate subordinate to himself; and having revived it, he could, under s. 44, send it back to the Magistrate who ordered the discharge for enquiry or trial. And this is precisely the same where there is a discharge under s. 195 upon an enquiry by a Magistrate with a view to commitment to the Sessions or to the High Court. For all cases of discharge, therefore, the Magistrate would, under the section, appear to have the most absolute and uncontrolled power of reviving the proceedings against the accused.

That this, however, was not the intention of the Legislature

is obvious from the provisions of ss. 295 and 296. A special proceeding is provided by s. 295 for the case in which an order (which in my opinion includes an order of discharge) is found to be illegal. All that the Magistrate can then do is to report the proceeding for the orders of the High Court. So by s. 296, if it appears to the Magistrate that some other offence has been committed than that of which the accused person has been discharged, he may direct the subordinate Magistrate to enquire into that offence; but this he can only do in a case which, when before that Magistrate, was a sessions case. If the Magistrate at the same time possessed the unlimited power of reviving proceedings in all cases of discharge and sending them down to his subordinates for further enquiry, which ss. 44, 142, 195, and 215 at first sight appear to give him, these provisions would be wholly meaningless.

It is this difficulty of reconciling the provisions of ss. 295 and 296 with the extensive powers conferred by the earlier sections that seems to me to render it necessary to put some restriction upon the literal meaning of those earlier sections; and taking the whole Act, the only conclusion I can come to is, that the Legislature did not intend that the Magistrate should, as a general rule, have any power at all of revision over the proceedings of subordinate Magistrates in cases of discharge. S. 296 gives that power in one special case only. If a Magistrate, therefore, thinks a discharge illegal or improper, it must be brought before the High Court; in the first case, by a report of the Magistrate under s. 295; in the second case, by an application under s. 297; when the High Court will, if the discharge was improper, order the accused to be tried or committed for trial. On the other hand, if there is any fresh evidence forthcoming, which was not before the Court when the first enquiry was held, then there is no necessity to revive the previous proceedings at all, and the Magistrate can proceed without any reference to the High Court. This seems to me to be a reasonable construction of the Act, and it is the only way in which I can reconcile all its provisions. That distinction was, I believe, first suggested in a reference by the Officiating Sessions Judge of Sylhet in the case *Hari Singh* v.

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Danish Mahomed (1) The learned Judges of this Court do not there say whether they approve of that distinction, but they affirm the order of the Magistrate who had remanded the case for a fresh enquiry upon the ground of there being "further evidence procurable which was not before the Court when the order of discharge was given," and not as the Sessions Judge points out on the ground of there being a "failure of justice." But in a subsequent case (2) three Judges of this Court held that a Magistrate could not, of his own motion, revive a case where the accused had been discharged without examining all the witnesses for the prosecution. I was a party to this judgment, and of course it was not our intention to overrule the decision of the late Chief Justice and Mr. Justice Glover in 20 Weekly Reporter. We could not do so; and it seems to me that these decisions are reconcilable in the way I have mentioned. I, therefore, hold that a Magistrate cannot, by his own order, revive proceedings where no further evidence is procurable which was not before the Court on the first occasion.

The only question, therefore, is, whether in this case there was, on the second occasion, any such further evidence. I think there was not. Indeed, I confess I have great difficulty in understanding what the first evidence is said to be. The petitioner was charged with using a defaced stamp; the envelope of the letter upon which the stamp was, was before the Court on the first occasion, and it is not denied that the stamp was also before the Court on that occasion; but it is said that a certain word, which was at that time written partly upon the stamp and partly upon the letter, was not before the Court as evidence. How that is possible I really cannot understand. I agree with the Sessions Judge entirely that this evidence was before the Magistrate on the first occasion, but its effect had been overlooked.

As to the second point, whether the conviction is illegal because the Magistrate himself gave evidence, that question seems to me to resolve itself into this. Is a sole Judge of law and fact competent to decide a case in which he has himself given evidence?

(1) 20 W. R., 46. (2) I. L. R., 1 Calc., 282.

It has been strongly contended on the part of the Crown that he is so, and that there is no impediment in law to a Judge giving evidence, and then disposing himself of the case by his sole opinion. No instance of this kind has, however, been found, and no authority of any Judge or text-writer has been cited in support of such a proposition. The English cases (they are very few and very old) do not go further than to establish that a person having to exercise judicial functions may give evidence in a case pending before him when such evidence can and must be submitted to the independent judgment of other persons, exercising similar judicial functions, sitting with him at the same time (*per* Norman, J., in *Queen* v. *Múkta Singh*) (1). No case in England is cited in which even under these circumstances a Judge has been called as witness in a trial on which he was sitting later than the trial of Lord Stafford.

Two cases are cited as having occurred in this country—one the case of *Queen* v. *Tarapersaud Bhuttacharjee* (2), and the other the case before Mr. Justice Norman above referred to. That learned Judge went into the matter on that occasion very fully; and having carefully considered his judgment, I have come to the conclusion that he did not intend to carry the law beyond that which he lays down as the result of the English cases. He is very careful to point out that, in the case before the late Nizamut Adawlut, the trial took place with the assistance of a Muhammadan law officer, who might have given a futwa acquitting the prisoner, and that if he had done so the Judge who gave that evidence could not have convicted him, but could only have referred the matter to the Nizamut Adawlut. Then he says at p. 19: "Prior to the enactment of the Code of Criminal Procedure, when a Sessions Judge was trying a case with the assistance of a Muhammadan law officer, it would seem from the case cited and from the analogy of the English cases referred to, that the Judge might have given evidence in a case tried before himself. By the substitution of a system of trial with assessors, a different species of check was introduced. The assessors give their opinions, which the Judge is bound to record. The Judge

(1) 4 B. L. R., A. Cr., 15. (2) N. A. Rep., 1857, pt. ii, p. 83.

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must transmit an abstract of a trial to the High Court, and on perusal of such abstract the Court may call for the record."

The learned Judge seems, therefore, to think that the presence of the assessors brings the case within the rule which he had derived from the English cases. Whether this is quite correct is, I think, open to some question; and it is not quite consistent with what the learned Judge had himself asserted in an earlier part of his judgment. But that appears to me to have been the view at which the learned Judge ultimately arrived.

In the absence, therefore, of any authority for the position that a sole Judge of law and fact may give evidence, and then decide a case in which he has been a witness, I refuse to give any countenance to what appears to me to be a most objectionable proceeding. Every one admits that it is highly objectionable for a Judge to give evidence even when there are other Judges besides himself. For my own part, I consider these objections so formidable that I would gladly see the practice of calling a Judge as a witness abolished in all cases. But these objections are greatly increased when the Judge who testifies is a sole Judge. The case is entirely in his hands. He has no one to restrain, correct, or check him. If he gives evidence upon any matter of importance, the party against whom his evidence tells could not venture to test his credibility either by cross-examination, or contradict it by other testimony. I need say nothing of the indecency of such a proceeding; no one dare venture to defend it. The Judge would therefore give his evidence without the usual safeguards against false testimony—a position which has been over and over again repudiated.

It was contended by Mr. Bell that the appeal to a higher Court was a check upon the Judge. To some extent it may be so, but not a sufficient one. The Appeal Court would deal with the evidence including that of the Judge. But in my opinion the evidence of the Judge being practically incapable of challenge or contradiction ought not to be even taken. Moreover, a Court of Appeal is not a check in the same way that Judges sitting together are a check upon each other. I am, therefore, of opinion that a Judge who is a sole judge of law and fact

cannot give his own evidence, and then proceed to a decision of the case in which that evidence is given, and that upon this ground, also, the conviction is bad; but as Mr. Justice Prinsep has some doubts about quashing the conviction on this ground, it is better that our judgment should proceed upon the first ground only.

The conviction and sentence are set aside. No application has, however, been made to us to order further proceedings, and we do not consider it necessary, of our own motion, to direct any further proceedings against the accused.

PRINSEP, J.—It is unnecessary to repeat the facts connected with the case now before us, as they have been already fully stated.

It is sought to set aside the conviction passed by the Magistrate on three grounds: first, because the evidence is not sufficient in law; secondly, because the Magistrate, being a witness for the prosecution, is not competent to try it as the sole judge of law and fact; thirdly, because, having discharged the accused under s. 215 of the Code of Criminal Procedure, the Magistrate was not competent to revive the proceedings and try the accused.

On the first point, I entirely agree with my learned colleague that there is evidence which, if believed, is sufficient for the conviction of the petitioner. That evidence, as pointed out by Mr. Justice Markby, does not consist solely of a comparison of handwriting, and I am not prepared also to assent to the proposition contended for by Mr. Jackson, that to establish an inference from a comparison of handwriting the evidence of an expert is absolutely necessary. Of course it is most desirable, but to lay this down as an absolute rule would, in nearly every case in this country, exclude such evidence because experts are not procurable. The powers given to Appellate Revisional Courts are sufficient to correct any misapplication of such evidence.

But before leaving this part of the case, I desire to state emphatically that I express no opinion on the value of that evidence or on the guilt or innocence of the petitioner.

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On the second point, I consider that the authorities quoted in the judgment of Mr. Justice Norman in *Queen* v. *Múkta Singh* (1) are conclusive that one who is sitting as a sole judge is not competent also to be a witness. No case has been quoted in which this has ever occurred, and the inexpediency of such a rule as well as its possible evil results, are too obvious to call for explanation. The case cited by Mr. Bell does not establish this rule, or go further than to state that a Judge is not competent to state in the judgment or to consider facts which can only come from the mouth of a witness.

But in the present case I am not inclined to set aside the proceedings on this ground, because it seems to me that Mr. Pellew's evidence was immaterial, and that if it be put out of consideration, there is evidence which, if believed, would be sufficient for the conviction of the petitioner.

On the last point as to the competency of a Magistrate to revive a case after he has passed an order of discharge under s. 215, I find that several decisions of this Court restrict this power to cases in which there may be some fresh evidence forthcoming. Had this point been before us for the first time, I should not be disposed to question a Magistrate's competency, provided that he is invested with the power described in s. 142; but I do not feel justified in the present case in adhering to that opinion, which is opposed to that of so many Judges of matured experience.

That there is no evidence which can properly be called fresh evidence is to my mind clear. The Magistrate considers that, on the definition of 'evidence' and 'document' in the Evidence Act, he is entitled to consider the word 'stamped' written across the obliterated stamp to be fresh evidence, because his attention was not directed to it; but I find it impossible to disconnect the word 'stamped' from the actual stamp which admittedly was in evidence, or to hold that anything which a Magistrate or Judge may accidentally overlook, and which it is difficult to understand how he could not have seen, can be deemed to be *fresh* evidence when his attention is especially

(1) 4 B. L. R., A. Cr. 15.

directed to what is practically a part of it. In this case, also, the Magistrate's own statement as a witness leaves it in doubt whether his attention was not drawn by the Postmaster to the word 'stamped.'

Then the statement of the cook recorded only after the order of discharge is, it is contended, fresh evidence. But even if it was not previously recorded, it is clear that the nature of that statement was known to the Magistrate from the Police report on which he discharged the accused. He alludes to that statement in his letter to the Postmaster reporting the result of the case, and he did not think it necessary to examine that witness, who had been bound over by the Police to appear before him.

Under these circumstances, I concur in quashing the conviction and proceedings taken subsequent to the order of the Magistrate discharging the accused, holding that, under the rulings of this Court, the Magistrate was not competent to revive the case; and I further am of opinion that we should not, on our own motion, direct the proceedings to be revived.

The order will render it unnecessary to consider the propriety of the sentence passed.

Conviction quashed.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1877 *April* 24.

SHIRO KUMARI DEBI (DEFENDANT) *v.* GOVIND SHAW TANTI (PLAINTIFF).*

Declaration of Title—Adverse Possession—Case made in Plaint—Issues.

A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues.

Tirumalasami Reddi v. *Ramasami Reddi* (1) dissented from.

Ram Lochun Chuckerbutty v. *Ram Soondur Chuckerbutty* (2) followed.

THIS was a suit for the confirmation of possession of, and the establishment of the plaintiff's jamai right in, 7 bigas of kheraji jamai lands, and for the setting aside an order and subsequent sale made in an execution-proceeding under s. 246 of the Code of Civil Procedure. The plaint stated that the lands in question were portion of an estate which originally belonged to one Ram Dhoba, and that the said Ram Dhoba sold them under a khosh-kobala to one Lochunkali, from whom the plaintiff purchased the said lands under a kobala on the 14th Joist, 1269 (27th May, 1862), since which time the plaintiff had been in possession of the said lands through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. The second issue fixed by the Munsif and the only one now material, was, "whether the disputed land was held by Lochunkali by virtue of purchase, and is held by the plaintiff as alleged by him." The Munsif held the plaintiff entitled to the relief sought for, on the ground that he had proved his own possession, and that of his predecessor Ram Dhoba, for twelve years before the institution of the present suit. The Civil and Sessions Judge, after remanding the case for further evidence, dismissed the appeal by the defendant, on the ground that the

* Special Appeal, No. 1678 of 1875, from the decision of J. Tweedie, Offg. Judge of Burdwan, dated the 9th June, 1875, confirming a decree of Baboo Gobind Chunder Ghose, Munsif of Bishtopore, dated 30th May, 1874.

(1) 6 Mad. H. C. Rep., 420. (2) 20 W. R., 104.

plaintiff and his vendor Lochunkali had together enjoyed twelve years' actual possession of the disputed property before filing his present suit for the establishment of his right and title, and was, therefore, entitled to a decree.

The defendant preferred a special appeal to the High Court.

Baboo *Rash Behary Ghose* for the appellant.—Mere proof of possession for twelve years will not justify the declaration the plaintiff asks for in this suit—*Tirumalasami Reddi* v. *Ramasami Reddi* (1), *Umbica Churn Banerjee* v. *Digumburee Dabee* (2), *Man Gobind Sircar* v. *Umbika Monee Dossee* (3), and *Moulvi Abdoollah* v. *Shaha Mujeesooddeen* (4). If the plaintiff wished to rely upon adverse possession for the statutory period, such a case ought to have been set up in the plaint and raised by the issues—*Huro Soonduree Debia* v. *Unnopoorna Debia* (5), *Bijoya Debia* v. *Bydonath Deb* (6), and *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (7). The Munsif having raised all the material issues in the case, the Court of appeal had no right to remit the proceedings to the Munsif under s. 354 of the Code of Civil Procedure.

Baboo *Nil Madhab Sen* for the respondent.—Proof of adverse possession for twelve years is sufficient to entitle a plaintiff to a declaratory decree—*Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (8). The question was sufficiently raised by the issues. Besides, the defendant never complained in the Court below that he had been in any way taken by surprise, and the objection must be allowed in special appeal.

Baboo *Rash Behary Ghose* in reply.—There was no allegation in the plaint that the possession of the plaintiff and his vendor had lasted for twelve years, and the second issue does not, therefore, raise the question of title by adverse possession. The case of *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (8) is distinguishable, there being nothing to show in the

(1) 6 Mad. H. C. Rep., 420.
(2) 12 W. R., 429.
(3) 16 W. R., 218.
(4) *Id.*, 27.
(5) 11 W. R., 550.
(6) 24 W. R., 444.
(7) 25 W. R., 315.
(8) 20 W. R., 104.

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report that title by adverse possession had not been alleged in the plaint or raised by the issues. That case moreover is contrary to the case of *Court of Wards* v. *Radhapershad Sing* (1), where the Court refused to make a decree on the basis of adverse possession, that case not having been made either by the plaint or the issues.

The judgment of the Court was delivered by

MARKBY, J.—This is a suit brought under the provisions of s. 246 of the Code of Civil Procedure for setting aside an order made in an execution-proceeding taken in respect of certain land, of which the plaintiff claims to be the owner. He put in a claim under s. 246, and failed; and thereupon he brought this suit, to use the words of that section, "to establish his right." He sets out his title saying that the land of which he claims to be the owner appertained to 23 bigas 11 cottas 7 chittaks of land which belonged to one Ram Dhoba; that out of the said land, Ram Dhoba sold 7 bigas, which are in dispute, to Lochunkali; that while Lochunkali was in possession of the said land, he sold it to the plaintiff under a kobala of the 14th Joist, 1269. "Since then I have been in possession of the same through bhag tenants, by annually paying Rs. 7-14-15 as the rent thereof to the maliks. To this there was no objection offered by any body."

Various issues were raised; and one of those issues, or rather part of one of those issues, is this,—Is the disputed land held by the plaintiff as alleged by him? Ultimately, after a remand, the Lower Appellate Court was not satisfied that the plaintiff had established the precise title which he had set up, but it was satisfied that he had been in possession for twelve years; and upon that ground gave him the declaration which he asked.

Now, in the first instance, it was broadly contended before us, that, in a suit of this kind, no declaration of the plaintiff's title can be made merely upon twelve years' possession; and in support of that, a decision of the Madras High Court, *Tiruma-*

(1) 22 W. R., 138.

lasami Reddi v. *Ramasami Reddi* (1) was relied on. With the general proposition there laid down, I must say I am unable to agree: it is in direct conflict with a decision of this Court in *Ram Lochun Chucherbutty* v. *Ram Soondur Chucherbutty* (2)—the decision of Sir Richard Couch and Mr. Justice Glover, wherein it is laid down in the most distinct terms that a declaration of title may be made upon proof of twelve years' possession. Sir Richard Couch says:—"What the plaintiffs sought was a declaration of title to this share in the land, and the first Court had given them that. They having been in possession of the land for more than twelve years, the title of any other person had been, to use the language of the Judicial Committee in the case of *Gunga Gobind Mundul* v. *The Collector of the 24-Pergunnahs* (3), extinguished in their favour. The effect of their possession was to extinguish other titles, if any existed; and we think, in a suit of this kind, although they failed to satisfy the Court that their title to the land had been acquired in the way they stated, if in fact they are entitled to it, they ought to have a declaration to that effect, and not be driven to bring another suit in which they would omit any statement of the manner in which they became entitled, and simply say that they were entitled to it, and that they had been in possession of it for a greater number of years, more than sufficient to bar all other claimants by the law of limitation, and ask for a decree on that ground."

It appears to me that if we look to the reason of the thing, we could come to no other conclusion. The plaintiff comes into Court, as for this purpose we must assume that he has a right to come, to prove his title. There is no reason whatever why he should not prove his title by any mode which will show that he has a good title, and when once the law has declared that twelve years' possession is a good title by itself, I do not see how it is possible that the Court can refuse to recognize that, any more than it can refuse to recognize a conveyance from a previous owner.

Then it is said that there are decisions of this Court in which

(1) 6 Mad. H. C. Rep., 420. (2) 20 W. R., 104.
(3) 11 Moore's I. A., 345.

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a contrary view has been taken. The decisions relied on are: *Moulvi Abdoollah* v. *Shaha Mujeesooddeen* (1); *Court of Wards* v. *Radhapershad Sing* (2), *Bijoya Debia* v. *Bydonath Deb* (3), *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (4). Now it is possible that there may be some conflict between the two last of those decisions and the decision of Sir Richard Couch, to which I have already referred, upon one point. Sir Richard Couch clearly thought that if the question of twelve years' possession was properly raised in the issues, the suit ought not to have been dismissed although the title had not been based upon that ground in the plaint. Possibly, I do not say that it is so, possibly there may be a conflict between the two last decisions and the decision of Sir Richard Couch upon that point; but we need not consider that, because I do not think that, upon the two important points which arise in this case, there is any conflict between the decision of Sir Richard Couch in *Ram Lochun Chuckerbutty* v. *Ram Soondur Chuckerbutty* (5) and the other decisions. I think, on the one hand, there is nothing which contradicts the decision of Sir Richard Couch, that a possession for twelve years is a good title upon which a declaration may be based; and on the other hand, I think, Sir Richard Couch clearly admits, what the other decisions expressly lay down, that the question of twelve years' possession must be raised in the issues. I think that appears from what Sir Richard Couch says, when dealing with the judgment of Sir Barnes Peacock, in the case of *Ram Coomar Shome* v. *Gunga Pershad Sein* (6). He says there: "The nature of the case, as appears from the papers," (that is, speaking of the papers of the case before Sir Barnes Peacock) "did not admit of the plaintiff's asking for what has been given to the plaintiff in this case by the first Court, namely, a declaration that he is the person entitled to the land."

It is precisely on that ground that the cases of *Bijoya Debia* v. *Boydonath Deb* (3) and *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (4), are distinguishable from the decision

(1) 16 W. R., 27.
(2) 22 W. R., 238.
(3) 24 W. R, 444
(4) 25 W. R., 315.
(5) 20 W. R., 104.
(6) 14 W. R., 109.

in the case of *Ram Lochun Chucherbutty* v. *Ram Soondur Chucherbutty* (1). In the case of *Bijoya Debia* v. *Bydonath Deb* (2), Sir Richard Garth says: "This decision," speaking of the decision of the Court below in that case, "appears to us to be entirely beside the plaintiff's real claim and the issues which have been raised, and properly raised, in the Court below;" and so Mr. Justice Macpherson says in the case of *Bhaygo Mutty Bibee* v. *Mahomed Wasil* (3): "The Lower Appellate Court ought not have given a decree in favour of the plaintiff upon a ground which is not suggested in the plaint, or in the issues tried." It is quite clear that when a plaintiff claims a title upon twelve years' possession, he must draw the attention of the defendant to the fact that he is going to claim a declaration upon that title, in order that the defendant may give his own evidence and scrutinize the evidence of the plaintiff upon that point, and see whether possession for twelve years is proved, and whether he can contradict it during any portion of that period. I think, therefore, it is clear how we ought to deal with this case. We ought, on the one hand, to hold that the plaintiff may have a declaration of his title based on twelve years' possession, but that if he wishes to claim a declaration upon a title of that kind, he must at least clearly raise that question in the issues in the case. Now, therefore, we must examine what are the issues raised in this case. Some issues were raised by the District Judge on appeal, and were remanded to be tried by the Munsif. I am not at all clear what new points the District Judge desired to have tried, but this is immaterial, because the new issues contain nothing about twelve years' possession. We need only, therefore, look at the issues as settled in the first Court. As I have already shown, the form of the issue there was whether the disputed land was held by the plaintiff as alleged by him? The issue, therefore, refers us back to the allegations in the plaint, and no question can arise in this case as to what would be the result if the issues disclosed a new title.

Now let us turn to see what the allegation in the plaint is. When we come to look at the allegation in the plaint, I think

(1) 20 W. R., 104. (2) 24 W. R., 444. (3) 25 W. R., 315.

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it is not sufficiently clearly stated that the plaintiff intended to rely upon twelve years' possession. In fact, the plaintiff says that he has not been himself in possession for much more than eleven years, and though he is, no doubt, entitled to join the possession of his vendor to his own possession, yet he has not given the date when his vendor came into possession, nor does he even make the general allegation that the possession of his vendor, coupled with his own possession, would amount to a period of twelve years. It follows that the question of twelve years' possession has not been properly raised either in the plaint or in the issues in this case, and the defendant had no proper notice that such a point was going to be raised; therefore, it was not open to the Lower Appellate Court, having negatived the title which had been alleged by the plaintiff, to declare in his favour a title which had not been alleged. For those reasons I think that the decision of the Lower Appellate Court is wrong, and it ought to be reversed, and the plaintiff's suit dismissed.

I only wish to add that it is not necessary for us now to consider whether we ought to interfere in this case on the ground that the suit ought not to have been remanded. But I think it right to say that, as far as I can see, there was no ground upon which a remand ought to have been directed in this case. The plaintiff had had an opportunity of proving his title, but he had failed to do so; and having failed to do so, I think the Lower Appellate Court ought to have dismissed the suit, and not to have given the plaintiff an opportunity of producing any further evidence.

The suit will be dismissed, and the appellant will be entitled to her costs in this Court and in the Courts below.

I think it desirable to add that, in this judgment, I do not express any opinion as to whether a declaration can be given upon a title which appears in the issues but is not set forth in the plaint. I only say that a declaration cannot be given on a title not distinctly stated either in the plaint or in the issues.

Decree reversed.

APPELLATE CRIMINAL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

EMPRESS ON THE PROSECUTION OF JODOONATH GHOSE *v.* BROJONATH DEY.* 1877 *June* 21.

Beng. Act III of 1864, *ss.* 2, 10, 11, 13, 15, 16, 57, *and* 58—*Public Highways —Municipal Commissioners, power of, to close or divert a public highway—Calcutta Municipal Act* (*Beng. Act VI of* 1863), *ss.* 109, 110.

Beng. Act III of 1864, which vests public highways in Municipal Commissioners for the purposes of the Act, does not by so vesting them give power to the Municipal Commissioners, nor *a fortiori* to the Vice-Chairman alone, to stop up or divert such public highways.

THE facts of this case were as follows:—Within the jurisdiction of the Municipal Commissioners of the town of Serampore there was formerly a lane, called the Shudgoppara Lane, leading to the River Hooghly. This lane ran through the garden of one Brojonath Dey, the defendant in this proceeding. In the year 1869 this lane was stopped by persons acting on behalf of the defendant; these persons were convicted under the Indian Penal Code of obstructing a public highway. Proceedings were subsequently taken by the defendant in the Civil Courts, with a view of establishing that the road was not a public highway, but these proceedings were unsuccessful; and in the present case it was admitted that the lane in question was a public highway. The litigation in the Civil Courts ended in 1871. In August, 1874, the present defendant presented a petition to the Municipal Commissioners of Serampore, which again sought to open the question whether the lane was a public highway, and also prayed for permission to close it under such conditions as the Municipal Commissioners might consider reasonable. On the back of the petition was written the following order, dated the 31st of December, 1874:—

"Application granted on condition that the applicant make at his own expense a road ten feet wide, round the south and

* Revisional Proceedings from an order of H. Haggard, Esq., Magistrate of Serampore, under s. 521 of the Code of Criminal Procedure.

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west side of his garden, so as to form a thorough communication between Distillery and Napitpara Lane."

This order was signed J. E. B. Jeffery. It was admitted that Mr. Jeffery was at that time Vice-Chairman of the Municipality, and it was not contended that this order was not made by him in that capacity. Prior to January, 1876, the said road was completely stopped up, and another road to the south and west of the defendant's garden was made. There was some doubt, however, whether this new road was really a new road, or whether it existed before, and was only widened. Applications, respectively made to the Municipal Commissioners and to the Chairman of the Municipality, who was also the Magistrate of the district, against the order of Mr. Jeffery, the Vice-Chairman, were refused on the ground that neither the Chairman nor the Municipal Commissioners had any power to interfere with the order of the Vice-Chairman. The matter was then, under s. 521 of the Code of Criminal Procedure, taken before the Joint Magistrate of Serampore, who, in October, 1876, called upon the defendant to show cause why the obstruction to the Shudgoppara Lane should not be removed. The Joint Magistrate ultimately held that the order of Mr. Jeffery was not illegal, and he refused to interfere further. The case then came before the High Court under s. 297 of the Code of Criminal Procedure, the question of law raised being whether the Joint Magistrate was right in holding the order of Mr. Jeffery to be legal.

The Municipal Commissioners were unrepresented.

Baboo *Troilokynath Mittra* for the complainant.—Under Beng. Act III of 1864 the Vice-Chairman of the Municipality had no authority to sell, divert, or close a public road. S. 13 only gave power to the Commissioners to sell land required for the purposes of the Act, and, therefore, did not apply to this case. Although the Commissioners had powers reserved to them under s. 58 of the Act to make alterations in fences, pavements, or posts of a highway, they could not obstruct or sanction an obstruction of the public roadway. The 10th section of the Dis-

trict Municipal Act (Beng. Act III of 1864), vesting the streets in the Commissioners, is in words precisely similar to s. 109 of the Calcutta Municipal Act (VI of 1863). S. 110 of the Calcutta Act, however, gives the Commissioners express power to divert and close up streets; it may, therefore, be assumed that the Legislature considered that, without such express permission, the Commissioners had no such power conferred on them by the words of s. 109. The District Municipal Act of 1864 does not contain such express permission as is found in s. 110 of the Calcutta Act of 1863. This omission was, no doubt, designedly made, and shows an intention to withhold such powers from District Municipal Commissioners. The same distinction is preserved in the Calcutta Municipal Consolidation Act (Beng. Act IV of 1876) and the Bengal Municipal Act (Beng. Act V of 1876). The Commissioners could not, therefore, be supposed to have the power to close a road altogether without such express permission. Ss. 12 and 15 of Beng. Act III of 1864 give no power to the Commissioners to substitute one public road for another. Under s. 213 of the Bengal Municipal Act of 1876, the Commissioners have power to close a road temporarily for certain purposes. The following cases were cited in the course of the argument: *Rex* v. *Justices of Worcestershire* (1), *Rex* v. *Justices of Surrey* (2), *Rex* v. *Horner* (3), *Reg.* v. *United Kingdom Electric Telegraph Co.* (4), *Reg.* v. *Train* (5), *Rex* v. *Winter* (6), *Reg.* v. *Justices of Calcutta* (7), and *Fowler* v. *Sanders* (8).

Baboo *Tarahnath Dutt* for the defendant Brojo Nath Dey.—S. 10 of Beng. Act III of 1864 vested public roads in the Commissioners, and, therefore, gave them a right to close or divert such roads.

Baboo *Troilokynath Mittra* in reply.

(1) 2 B. & Ald., 228.
(2) 7 D. & Row., 857.
(3) 2 B. & Ad., 150.
(4) 9 Cox, Cr. Ca., 137.
(5) 9 Cox, Cr. Ca., 180.
(6) 8 B. & C., 785.
(7) 2 Ind. Jur., N. S., 182.
(8) Cro. Jac., 446.

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MARKBY, J. (after stating the facts of the case):—The question turns on the construction of Beng. Act III of 1864, which was in force when the order of Mr. Jeffery was made. The powers and duties of the Municipal Commissioners are defined in ss. 6 to 23. No power to stop up or divert public highways is anywhere in express terms given by the Act; but public highways not being the property of Government or private property are, by s. 10, vested in the Municipal Commissioners. By s. 9 the Municipal Commissioners are enabled to sue and be sued in their corporate name, to hold properties, moveable and immoveable, and to convey the same, and to enter into all necessary contracts for the purposes of the Act. By s. 12, the Municipal Commissioners are required to apply all property vested in them for the purposes of the Act.

The argument is, that Shudgoppara Lane was a public highway vested in the Municipal Commissioners, and that, under the Act, the Municipal Commissioners may dispose of their property in any way they please, provided they do so for the purposes of the Act, which purposes, it is further said, are defined in the preamble, namely, the "conservancy, improvement and watching" the district where they have jurisdiction. The Commissioners, therefore, it is argued, had a right to stop up this road, if their doing so was for the improvement of the town, of which they are the sole judges. I am of opinion, however, that it was not the intention of the Legislature to give by implication these very wide powers to the Municipal Commissioners. I read the provisions of those sections of the Act which define the powers and duties of the Commissioners quite differently. I think the general words of ss. 9, 10, and 12 are controlled by the specific provisions of ss. 13, 14, 15, and 16. In regard to highways, which are the property of the Municipal Commissioners, I think that the only powers which Municipal Commissioners have over them is to make, repair, and keep properly cleansed such highways, and to do such things upon them as are necessary for conservancy (s. 15). If any more extensive works are necessary, then the consent of the Lieutenant-Governor must be taken (s. 16), and even with the consent of the Lieutenant-Governor there is no power to

stop up a road. It seems to me that if the mere fact of property being vested in the Municipal Commissioners for the purposes of the Act gave them the extensive powers contended for, those sections which define the powers of the Municipal Commissioners over their property would be meaningless.

This construction of the Act appears to me to be most in accordance with what is reasonable and proper. By s. 20, the Chairman or Vice-Chairman may make any order authorized by the Act unless it be expressly required to be made at a public meeting, and, therefore, if by the Act the Municipal Commissioners are authorized to make an order for the stopping up of a public highway, it would be very difficult to say that that order might not be made by the Chairman or Vice-Chairman acting alone, and the order in the present case was in fact made by the Vice-Chairman upon his sole responsibility. It is most improbable that the Legislature intended to confer such extraordinary powers upon a single individual.

The construction which I have put upon Beng. Act III of 1864 is further confirmed by a comparison of its provisions with those of Beng. Act VI of 1863, relating to the town of Calcutta, upon which the Act of 1864 was obviously modelled; s. 109 of Act VI of 1863 vests the streets of Calcutta in the Justices almost in the same words as s. 10 of Act III of 1864 vests public highways in the Municipal Commissioners. But by s. 110 of the former Act express power is given to the Justices, with the sanction of the Bengal Government, "to turn, direct, discontinue or stop up any public street." This, I think, shows that merely vesting highways in a Municipality does not *ipso facto* empower the Municipal body to stop them up, if they happen to consider that to do so is advantageous for the town. I may also observe that to hold that the Municipal Commissioners derive a power to stop up highways from the circumstances that certain highways of the town are vested in them would lead to this, that highways not vested in them could not be stopped up. This distinction would be reasonable enough as regards highways vested in Government, but quite unreasonable as regards highways which are the property of private individuals.

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I, therefore, consider that this order of Mr. Jeffery permitting Baboo Brojonath Dey, upon certain conditions, to stop up this lane, was an order which neither he as Vice-Chairman, nor the Municipal Commissioners, had power to make; and that the order of the Joint-Magistrate of 21st December, 1876, holding Mr. Jeffery's order to be legal, was wrong in law, and ought to be set aside. The record of the proceedings against Brojonath Dey, under s. 521, will be returned to the Joint-Magistrate, and he will finally dispose of those proceedings by such order as he thinks proper, treating Mr. Jeffery's order for the purpose of those proceedings as a nullity.

I am very glad to have arrived at a result which will probably have the effect of restoring to the inhabitants of the neighbourhood the use of the road of which they appear to me to have been very improperly deprived. I quite agree with the condemnation passed by the Magistrate and present Joint-Magistrate upon Mr. Jeffery's order, by which the interests of the public seem to have been sacrificed to those of a single individual.

PRINSEP, J.—I concur in holding that Mr. Jeffery, as Vice-Chairman of the Serampore Municipality, was not competent under Beng. Act III of 1864 to close the Shudgoppara Lane; that his order must be considered to be a nullity; and that the proceedings taken under s. 521 of the Code of Criminal Procedure, by the present Joint-Magistrate of Serampore, should proceed.

Order set aside.

ORIGINAL CIVIL.

Before Mr. Justice Kennedy.

KADUMBINEE DOSSEE *v.* KOYLASH KAMINEE DOSSEE AND OTHERS.

1877 *May* 29.

Hindu Widow, suit by, as Administratrix of Husband leaving a Minor Son.

A Hindu widow, who has obtained letters of administration from the High Court of the estate of her husband who has left a minor son, is not entitled in such character to maintain a suit with respect to immoveable property left by him. The Court refused to allow such a suit to proceed adding the son as a party, or to treat the plaintiff as manager of the infant, but dismissed the suit with costs.

THE plaintiff sued as the widow and administratix of one Nundolal Paul, to recover possession of a piece of land in Calcutta, which formed portion of the estate of her husband, who died intestate in 1873, and from which she had been dispossessed by the defendants.

Letters of administration of the estate of her husband had been granted by the High Court to the plaintiff on the 26th of April, 1873.

Mr. *Piffard* and Mr. *R. Allen* for the plaintiff.

Mr. *Branson* and Mr. *Bonnerjee* for the defendants.

On cross-examination of the plaintiff's brother it appeared that the plaintiff's husband had left a son, who was a minor, and the defendant's counsel thereupon contended that the suit could not be maintained by the plaintiff, although she had taken out administration of her husband's estate. The Court, on the application of the plaintiff's counsel, then allowed him until the next day to look into the question.

Mr. *R. Allen* on the next day said, that he had been unable to find any authority for the contention that the present plaintiff as administratrix could maintain this suit. The power of the Court to grant letters of administration, which was derived through the Supreme Court (see Charter of 1774, s. 22) from the

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original jurisdiction possessed by the Ecclesiastical Courts in England, would only enable such grants to be made respecting personalty. The Succession Act, which related both to real and personal property, did not apply to Hindus; and in so far as it was made applicable to Hindus by the Hindu Wills Act, it did not provide for cases of intestacy; those cases, therefore, remained as before. Thus the same difficulty remained, that the grant of administration would not enable the administrator to deal with or represent real property. The learned counsel referred to the case of *Doe* d. *Savage* v. *Bancharam Tagore* (1), in which it was held that although land was real property *sub modo* yet it was an asset under the Charter for the payment of debts in the hands of an administrator: therefore, such administrator could maintain an action of ejectment in respect of the land. The case of *In the goods of Abdullah* (2) and Act XXVII of 1860 were also referred to. The learned counsel asked, in case the Court should be against him, that the plaintiff's son might be added as a party plaintiff, or the plaintiff be treated as the manager on behalf of the infant son, and the plaint amended accordingly.

Without calling on the defendant's counsel the following judgment was delivered:—

KENNEDY, J.—I cannot add the minor as a party plaintiff, and I think I must dismiss the suit, for it appears to me that the plaintiff has no interest in the land and no right to maintain this proceeding. These are two reasons why the minor should not be joined as a party plaintiff: first, because if he were made a party at this stage of the proceedings when several witnesses have already been examined, he would be bound by evidence given in his absence; and secondly, because his being made a party would, probably, expose him to an adverse decision which would be clearly binding on him; and I even think he would be incapacitated from hereafter seeking to disallow the plaintiff's costs of the suit from being paid out of his estate in administration. These costs would then be costs in a cause to which he would be a party, and specially made a party by order of Court. When I first heard of the existence of a son of Nundo-

(1) Montriou's Morton, 105. (2) Morton, 19, at p. 22.

lal it occurred to me, on general principles, that the suit could not be maintained. There is not much authority on the question, and though I have looked into it myself and been aided by Mr. Allen's research, I have not been able to discover any direct authority bearing on the point. It is clear, however, that, in respect to Hindus, letters of administration granted by the Supreme Court conveyed no more estate than what by the ecclesiastical law of England vested in the ordinary or the administrator,—that is to say, personal estate only. The Indian Succession Act and the Hindu Wills Act expressly exclude Hindus from the operation of the provisions in the first of these relating to administration, save those respecting administration with a will annexed. Act XXVII of 1860 goes even further to limit the effect of a certificate in the nature of administration granted by the Mofussil Courts to Hindus under the provisions of that Act. And as regards Fergusson's Act, 9 Geo. IV, c. 33, that expressly excludes executors and administrators of Hindus and Mahomedans from the powers and provisions of the Act, and even in the cases where it did apply, it would seem that it did not vest the lands in the executors or administrators; it only conferred on them a power of sale. I, therefore, think that the plaintiff has no such estate in law as would entitle her to maintain this suit.

It has been urged that I might treat the plaintiff as manager on behalf of the infant, and as such allow her to proceed with the suit. I do not think I can let her do so. I do not think that the manager of a Hindu family, who has no interest in the estate at all, is entitled, by virtue of his managership, to sue in his own name. I am aware that, in the Mofussil Courts, plaints are constantly presented by A. B., guardian of C. D., against E. F., as guardian of G. H. I have grave doubts whether such suits are validly instituted; but the long course of practice may perhaps validate them, and the 4th schedule to the new Procedure Code, No. 11, seems to contemplate the existence of suits by a manager without bringing the actual party on the record. However, that Act is not yet in force, and I don't know of any instance in this Court in which such a plaint has been admitted, and I should be unwilling to introduce

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here, save by express legislative direction, the mofussil form. But even in the mofussil the person really entitled is named in the title, and that has not been done here, so that even if I were inclined to do so, the frame of the plaint in this case would not allow me to treat it as being a suit of the description in the mofussil, which I have mentioned. I must, therefore, dismiss the suit with costs on scale 2.

Suit dismissed.

Attorney for the plaintiff: Mr. *Remfry.*

Attorneys for the defendants: Mr. *Wheeler* and Mr. *Pittar.*

Before Mr. Justice Kennedy.

1877 *July* 19.

KHOBLALL BABOO *v.* RAMCHUNDER BOSE.

Suit on Decree of Small Cause Court.

A suit can be brought in the High Court on a decree of the Small Cause Court.

SUIT on decree of the Calcutta Small Cause Court for Rs. 297, dated the 16th March, 1874. The case was, by order of the learned Judge, set down for settlement of issues in order to have the question raised whether the suit could be maintained. The suit was undefended.

Mr. *Bonnerjee* appeared for the plaintiff.

KENNEDY, J.—I had this case set down for settlement of issues, because one of the Judges of this Court has expressed an opinion that a suit on a decree of the Small Cause Court cannot be maintained in this Court. I knew that that there had been decisions in cases in which the question was not argued, allowing such suits to be brought in this Court; and I applied to the Chief Justice to allow the case to be referred to a Full Bench. I came, however, to the conclusion that the course which had been allowed to prevail in this Court was a right one, and the Chief Justice thought that, under those circumstances, a Full Bench could not be granted. The difficulty has been raised by the decision of the Court of Queen's Bench in *Berkeley* v. *Elderkin* (1), in which it was held that no action could be maintained in the

(1) 1 E. & B., 805.

Superior Courts on a judgment of a County Court in England. Lord Campbell, the Chief Justice, gave a judgment in that case, in which he went into several reasons why such suits should not be allowed; the other Judges of the Court (Wightman, Erle, and Crompton, JJ.) did not go so far with him as to assent to all his reasons, but there was one point on which the Court was quite unanimous,—*viz.*, that, by s. 100 of the English County Courts Act, 9 & 10 Vict., c. 95, a judgment of a County Court is in fact never final (1).

That case, and a case in which it was followed, *Austin* v. *Mills* (2), were brought to the notice of the Court in two cases in Ireland, where there is a system of County Courts long established under an Act, which does not contain precisely the same provisions as those in the English County Courts Act; and the Judges there were of opinion that they would be bound to follow the decision of the Court of Queen's Bench if applicable. The Court, however, finally held, in *Cary* v. *Grispi* (3), that, in consequence of the absence from the Irish Act of the particular provisions which were in the English Act, the *ratio decidendi* of the Court of Queen's Bench did not apply in Ireland, and I think the same would be the case here. There were two cases,—one *Moffatt* v. *Burrowes* (4), in which the Court was divided in opinion; and another, *Cary* v. *Grispi* (3), in which the entire Court of Common Pleas was unanimous in holding that the reasons given by Lord Campbell and the other Judges in *Berkeley* v. *Elderkin* (5), did not apply to the Irish Act. I think I may adopt, and for the sake of avoiding prolixity I do adopt, the reasons which are put forward by Chief Justice Monahan, in *Moffatt* v. *Burrowes* (4), and in the judgment of Keogh and Christian, JJ., in *Cary* v. *Grispi* (3). I cannot add anything to those reasons, and I think I may safely adopt them (6).

Attorney for the plaintiff: Baboo *Troyluckonath Roya.*

(1) *Ed. Note.* The section quoted empowers the County Court Judge to rescind or alter any order as to payment by instalments or otherwise made against a defendant.

(2) 9 Exch., 288.

(3) 9 Ir. Com. Law Rep., 25.

(4) 4 Ir. Com. Law Rep., 297

(5) 1 E. & B., 805.

(6) The case came in for hearing as an undefended case on 23rd July, and a decree was given for the amount sued for, with costs after decree.

FULL BENCH.

Before Sir Richard Garth, Kt., Chief Justice, Mr. Justice Kemp, Mr. Justice Jackson, Mr. Justice Macpherson, and Mr. Justice Ainslie.

1877
March 26.

THE EMPRESS *v.* JYADULLA.*

Criminal Procedure Code (Act X of 1872*), s.* 272—*Appeal—Acquittal—Limitation—Act IX of* 1871, *s.* 5, *cl. b, and Sched. II, art.* 153—*Act XI of* 1874, *s.* 23.

An appeal by the Local Government under s. 272, Criminal Procedure Code, is within time if presented within six months from the date of acquittal. The sixty days rule does not apply.

THE following case was referred to the Full Bench by Macpherson and Birch, JJ. :—

In this case the Local Government has appealed (under s. 272, Criminal Procedure Code) from a judgment of acquittal.

The acquittal was on the 29th of August, 1876, and the appeal therefrom was not presented until the 6th of February, 1877, *i. e.*, after a lapse of about five months and seven days.

The Court (Markby and Mitter, JJ.) admitted the appeal "subject however to the consideration of the question whether the appeal has not been presented after the time allowed by law. . . . . If the period of sixty days is the time allowed for an appeal by the Crown, as well as for an appeal by the prisoner, in that case we think the Crown ought to be held strictly to sixty days, because no ground has been shown to us for enlarging the time under s. 5, cl. *b*, of Act IX of 1871."

We think the question is of so much importance that it ought to be set at rest at once by an authoritative decision of a Full Bench, especially as in a variety of cases in which the point was not raised, appeals by Government against acquittals, presented after sixty days, have been admitted without hesitation.

The question arises in the following manner :—

The Limitation Act, IX of 1871, Schedule II, art. 153, says, that the period of limitation for appeals to the High Court

* Criminal Motion, No. 27 of 1877.

under the Code of Criminal Procedure is sixty days, and that the date of the sentence or order appealed against is the time when the period of sixty days begins to run. By s. 6 of the same Act it is provided that, when by any law thereafter to be in force in British India, a period of limitation differing from that prescribed by the Limitation Act is specially prescribed for any appeals, nothing in Act IX of 1871 shall affect such law.

Thereafter, by Act X of 1872 (Criminal Procedure Code), s. 272, an appeal was given to the Local Government from a judgment of acquittal: and it was declared "the rules of limitation shall not apply to appeals presented under this section." By Act XI of 1874, s. 23, this clause is repealed, and for it is substituted the following clause:—"No appeal shall be presented under this section after six months from the date of the judgment complained of." So that as the law now stands, by s. 272 modified by s. 23 of Act XI of 1874, the Government may appeal from a judgment of acquittal, but no such appeal shall be presented after six months from the date of the judgment complained of.

On the one hand it is contended, that the ordinary sixty days limitation applies to appeals by Government from judgments of acquittal, and that the six months are mentioned in s. 23 of Act XI of 1874, not as giving a right of appeal at any time within six months, but as providing that such an appeal must, under all circumstances, be presented within six months, after which time no excuse whatever can be received under the Limitation Act, 1871, s. 5, clause *b*, as sufficient cause for not having appealed within the sixty days.

On the other hand it is contended, that Act IX of 1871 does not apply to these appeals at all, and that there is no limitation of the right of appeal save s. 23 of Act XI of 1874, which says the appeal must be presented within six months.

The question referred is, whether an appeal by the Local Government under s. 272 from a judgment of acquittal is within time if presented within six months from the date of the acquittal, although presented more than sixty days from that date.

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EMPRESS v. JYADULLA

The *Advocate General*, offg. (Mr. *Paul*) for the Crown.

The following was the opinion of the Full Bench:—

GARTH, C. J.—We are of opinion that an appeal from an order of acquittal is within time if presented within six months from the date of the order of acquittal. The sixty days rule does not apply (1).

APPELLATE CIVIL.

Before Mr. Justice L. S. Jackson and Mr. Justice White.

1877 *May* 22.

BHEKNARAIN SINGH AND ANOTHER (DEFENDANTS) *v.* JANUK SINGH (PLAINTIFF).*

Hindu Law—Mitakshara—Son's Interest in Ancestral Property—Mortgage by Father during minority of Sons.

A Hindu, subject to the Mitakshara law, and forming with his sons a joint Hindu family, mortgaged certain ancestral immoveable property during the minority of his sons. In a suit by the mortgagee against the father and sons to recover the mortgage debt "by sale of the mortgaged property, and out of other properties, as well as from the person" of the father,—*held*, that it was incumbent upon the plaintiff to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the plaintiff had at least good grounds for believing did justify the father in charging, the sons' interests in the ancestral immoveable property.

THE special appellants, who were two of the defendants in the Court below, sought relief against a decree passed by the Officiating Judge of Patna, under which their shares of the ancestral property were declared liable to be sold in satisfaction of a bond executed by their father, the first defendant, in favour of the respondent, who was the plaintiff in the Court below.

(1) *Ed. Note.* In "*Reg.* v. *Dorabji Bakibhai*" (11 Bom. Rep., p. 117) it was held, that s. 272 of Act X of 1872 must be read by itself.

* Special Appeal, No. 836 of 1876, against a decree of E. Grey, Esq., Officiating Judge of Zillah Patna, dated the 17th of February, 1876, reversing a decree of Baboo Ram Persad, Second Subordinate Judge of that district, dated the 15th of January, 1875.

It appeared that the father of the special appellants, on the 12th of January, 1871, borrowed Rs. 1,100 from the respondent, at 1 rupee per cent. per mensem; and as a security for the loan, executed a bond to the respondent, by which he hypothecated, or mortgaged, to the respondent a 12-anna share in a certain mouza, with a stipulation that the money should be repaid in two years from the date of the bond.

It further appeared that the 12 annas share of the mouza was the ancestral property of the special appellants and their father; that the bond was executed whilst the special appellants were minors; and that they and their father formed a joint Hindu family governed by the Mitakshara law. On failure of the father to repay the money at the expiration of the appointed time, the respondent, on the 31st of August, 1874, brought the present suit, in which he sought to recover the amount due on the bond "by sale of the hypothecated property, and out of the other properties, as well as from the person" of the father. The suit in the first instance was brought against the father alone, but, subsequently, on the 7th of October, 1874, the plaintiff petitioned the Court to be allowed to add the special appellants as defendants, alleging that the loan to the father was applied to answer the joint necessities of the father as well as of his sons, and for the support and the education of the latter. The special appellants were, accordingly, by leave of the Court, made defendants in the suit, the mother of the younger of them, who is still a minor, appearing on the record as his guardian. The Court of first instance considered the loan and the bond to be proved, but gave a decree to the plaintiff against the father alone, and in respect only of 4 annas out of the 12 annas share hypothecated by the bond. As against the special appellants, that Court dismissed the suit, on the ground that there was a failure of proof that there was any legal necessity for the loan, and that, consequently, the interest of the special appellants in the ancestral immoveable property was not properly and validly charged with the repayment of the loan.

On appeal by the respondent, the Officiating Judge, considering that he was acting in accordance with the decisions in *Gir-*

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dharee Lall v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamut Gowrunbutty* (2), remanded the cause for a finding on the following issue, *viz.* :—" Whether the money borrowed by the father (defendant No. 1), was borrowed for an immoral purpose?" The Judge at the same time ruled that the burden of proof on the above issue rested on the defendants. He further added that the decision of the case turned on the finding upon that issue, and that if the money was borrowed for an immoral purpose, the appeal must be dismissed; but if not borrowed for such a purpose, the plaintiff was entitled to have the whole 12 annas of the mouza sold in satisfaction of his bond.

Under the order of remand, the Court of first instance returned to the Officiating Judge a finding in favour of the defendants. But the Officiating Judge, when the appeal came before him for final decision, considered that the evidence adduced by the defendants was insufficient. He, accordingly, held, "that the issue was not proved in the affirmative," and acting on the view of the law which he had stated in his order of remand, reversed the decree of the Court of first instance, and made a decree in favour of the plaintiff in respect of the whole of his claim.

From this judgment the two sons now appealed.

Baboos *Chunder Madhub Ghose* and *Abinash Chunder Banerjee* for the appellants.

Baboo *Mohesh Chunder Chowdhry* for the respondent.

The judgment of the Court was delivered by

WHITE, J. (who, after stating the facts as above, continued) :— It is to be observed that the present suit is not one in which a son is seeking to set aside a sale of ancestral property made by his father or to recover from a purchaser ancestral property which has been sold in execution of a decree against the father; but a suit in which a creditor, in whose favour a father has created a charge upon the ancestral immoveable estate, is endeavouring to

(1) 13 B. L. R., 187; S. C., L. R., 1 I. A. 321; and 22 W. R., 56.

(2) 15 B. L. R., 264; S. C., 23 W. R., 365.

enforce that charge against the share or interest of the sons in that ancestral estate, where the latter were no parties to the charge, and were also minors at the time of its creation. Such being the nature of the present suit, the proposition of law laid down by the Officiating Judge amounts to this, that when a creditor brings such a suit, he is entitled to a decree against the sons upon simply proving the loan and the instrument of charge, and that his right to a decree can only be defeated, in the event of the sons showing that the money was advanced for an immoral purpose. In other words, any charge which the father may create upon the ancestral immoveable property during the minority of his sons is a valid charge, and must be satisfied out of that property, unless the sons, on whom the Judge throws the burden of proof, can show that the charge was created to secure money borrowed by the father for immoral purposes. If this be good law, it follows that the interests in the ancestral immoveable property, which, under the Mitakshara law, are vested in sons by their birth, are entirely unprotected from the selfish or wasteful or capricious acts of the father except in the single instance of money borrowed by him upon the estate for immoral purposes.

The decisions on which the Officiating Judge relies in support of a proposition fraught with such serious consequences, are *Girdharee Lall* v. *Kantoo Lall* (1) and *Muddun Gopal Lall* v. *Mussamat Gourunbutty* (2). But neither of these cases, when examined with reference to the facts involved in them, can, in my opinion, be considered as authorities for any such doctrine.

In *Girdharee Lall* v. *Kantoo Lall* (1), the suit was brought by sons for the purpose of setting aside a deed of sale of ancestral property executed by their father, and also of recovering from the purchaser the whole of the property which purported to pass by the deed. In giving the judgment of their Lordships, Sir Barnes Peacock, after referring to a certain rule laid down by Lord Justice Knight Bruce, in the case of *Hunooman Pursad* v. *Mussamat Babobee* (3), proceeds thus:—"It is necessary, therefore, to see what was the nature of the debt for

(1) 14 B. L. R., 187; S. C., L. R., 1 I. A. 321: and 22 W. R., 56.

(2) 15 B. L. R., 264; S. C., 23 W. R., 365.

(3) 6 Moore's I. A., 393.

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the payment of which it was necessary to raise money by the sale of the property in question." The facts regarding the nature of the debt, which their Lordships considered to be established, were that, previous to the sale which was sought to be set aside, a bond had been executed by the father, upon which a decree had passed and execution issued against the father. "The bond," as their Lorsdhips observe, "had been substantiated in a Court of justice," and the purpose for which the bond was given had not been impugned. The words used by their Lordships in observing upon this latter circumstance are as follow:—"There was nothing to show that it, *viz.*, the bond, was given for an immoral purpose; and the holder recovered a decree upon it. There is no suggestion that either the bond or the decree was obtained *benamee* for the benefit of the father, or merely for the purpose of enabling the father to sell the family property and raise money for his own purpose. There is nothing of the sort suggested and nothing proved.". Their Lordships further considered it established by the evidence that it was necessary for the father to raise money to get rid of the execution which had issued upon the decree obtained upon this unimpeached bond; that acting under that necessity the father executed the deed of sale in question; and that the purchase-money arising from the sale "had been paid into the bankers of the father, and been applied partly to pay off the decree, and partly to pay off a balance due from the father to the bankers, and partly to pay Government revenue." Upon this state of facts, the Judicial Committee decided that it was "not because there was a small portion which was not accounted for, that the son, probably at the instigation of the father, has a right to turn out the *bonâ fide* purchaser who gave value for the estate," adding, that "even if there was no necessity to raise the whole purchase-money the sale would not be wholly void."

Their Lordships' decision, as I understood it, proceeds on the ground that a *primâ facie* case of necessity for the sale had been shown, against which no rebutting evidence had been offered, and that as, moreover, a considerable portion of the purchase-money had been proved to be applied for purposes which would

make the sale binding on the sons, their suit to set aside the sale could not be maintained.

In *Muddun Gopal Lall* v. *Mussamat Gourunbulty* (1), sons were again the plaintiffs, and brought a suit against their father and elder brother, and certain persons who claimed interests in the ancestral estate under bonds, or as purchasers in execution of decrees obtained on bonds, praying for a partition of the ancestral estate and for possession of their shares free from encumbrances by cancelment of the bonds. Phear, J., in delivering the Court's judgment, which was given in those appeals at the same time, states, as the facts found "that in Muddun Gopal's case the plaintiffs' father and elder brother had mortgaged 8 annas of the joint property to Muddun Gopal in consideration of a loan of money which was wanted for a family purpose; and that in the cases of Girdharee Lall and Pooran Lall, the plaintiffs' father and elder brother had mortgaged 8 annas of the joint property in order to prevent the sale of that property at the instance of Girdharee Lall and Pooran Lall, in execution of decrees which these persons had respectively obtained against the father and eldest son personally."—And the Court then held that, under these circumstances, the plaintiffs, the minor sons, were not entitled to obtain their share of the joint property free from these mortgages.

In neither of the decisions which are relied on by the Officiating Judge was the suit brought by a bond-holder or mortgagee against the father and sons to enforce a charge upon the ancestral estate created by the father, and in both of the decisions it is clear that the transaction of the father, whether it consisted of a sale or a loan, was inquired into by the Court with a view to see if there was any legal necessity for the transaction, or if it had reference to family purposes, and that the result of that inquiry formed the main ingredient of the decisions arrived at.

The liability of a son for the debts of his deceased father under Hindu law appears to me to be a distinct question from the right of a father in his lifetime to charge the interest of his infant sons in the joint ancestral immoveable estate with the

(1) 15 B. L. R., 264; S. C., 23 W. R., 365.

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payment of a debt. It is the latter question which is before the Court in the present suit; and to arrive at a correct decision, I think that the principles to be applied are those which are laid down in the leading case of *Hunooman Persad* v. *Mussamat Babooee* (1). The authority of that case has been often recognized in the Privy Council, and notably in *Lalla Bunseedhur* v. *Koonwar Bundesuree*(2), and also in *Giridharee Lall* v. *Kantoo Lall* (3). In *Hunooman Persad's case*, the mortgage was made by a mother and widow, as guardian of her infant son and manager of his estate, but so far as relates to the interests in the ancestral estate which sons get by birth under the Mitakshara law, and the right of the father to alienate the same, there seems to be no essential difference between the position of the father when dealing with those interests during the minority of his sons, and the position of a mother when dealing as guardian and manager of her infant son's estate. Lord Justice Knight Bruce says in *Hunooman Persad's case:* "The power of the manager for an infant heir to charge an estate not his own is, under the Hindu law, a limited and qualified power; it can only be exercised rightly in a case of need or for the benefit of the estate;" and with respect to the question on whom the onus of proof lies, his Lordship, after stating that the onus will vary with the circumstances, proceeds to say: "When the mortgagee himself with whom the transaction took place is setting up a charge in his favour made by one whose title to alienate he necessarily knows to be limited and qualified, he may be reasonably expected to allege and prove facts presumably better known to him than to the infant heir,—namely, those facts which embody the representations made to him of the alleged need of the estate and the motives influencing his immediate loan."

Taking these to be the principles of law applicable to the decision of this suit, I am of opinion, that the Officiating Judge was wrong in holding that it lay upon the special respondents to prove that the loan was contracted by the father for immoral purposes, and that on their failing to do so, the respondent was

(1) 6 Moore's I. A., 393.

(2) 10 Moore's I. A., 454, at p. 461.

(3) 14 B. L. R., 187; S. C., L. R., 1 I. A., 321; and 22 W. R., 56.

entitled to a decree for a sale of the special appellants' interests in the ancestral property. Before he was entitled to such a decree, I think it was incumbent upon the respondent to show for what purpose the loan was contracted, and that that purpose was one which justified the father in charging, or which the respondent had at least good grounds for believing did justify the father in charging, the interests which the special appellants have in the ancestral immoveable property. As the respondent has failed to show this either in the Court of first instance or in the lower Appellate Court, I think the order of remand, and the subsequent decree of the Officiating Judge, must be reversed, and that of the Court of first instance restored. The appeal is allowed with costs.

Decree reversed.

ORIGINAL CIVIL.

Before Sir Richard Garth, Kt., Chief Justice, and Mr. Justice Macpherson.

KELLIE (DEFENDANT) *v.* FRASER (PLAINTIFF).

1877
July 12 & 19.

Jurisdiction—Cause of Action—Suit for land—Letters Patent, 1865, *cl.* 12—*Application to file award—Act VIII of* 1859, *s.* 327—*Revocation of authority of Arbitrators.*

The plaintiff and defendant entered into partnership for the purpose of carrying on the cultivation and manufacture of tea, on a tea estate at Darjeeling, of which they were the owners in certain shares. The deed was executed and registered in Calcutta, but both the parties resided out of the jurisdiction. The deed contained provisions for a reference to arbitration in case of difference or dispute in any matters relating to the partnership. Differences having arisen, arbitrators were appointed in accordance with the clause in the deed. In the course of the arbitration proceedings one of the arbitrators received two telegrams purporting to be sent by the plaintiff and defendant to the arbitrators, the terms of which were "stay further proceedings, arrange matters here." The arbitrators subsequently made their award in Calcutta to the following effect: that the defendant's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff as security for such payment; that the partnership should be dissolved on certain terms, and that the tea garden at

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Darjeeling should be sold in Calcutta. In an application under s. 327, Act VIII of 1859, to file the award, *held*, affirming the decision of the Court below, that the High Court at Calcutta had jurisdiction to file the award. S. 327 gives jurisdiction to file an award to any Court in which a suit in respect of the subject-matter of the award might be instituted. A suit in respect of the subject-matter of this award would not be a suit for land, but a suit in which, by reason of the execution of the deed of partnership in Calcutta, a part of the cause of action arose there; such a suit could, with leave, have been instituted in the High Court: that Court, therefore, had jurisdiction to file the award.

Held also, that the telegrams sent to the arbitrators did not amount to a revocation of their authority.

APPEAL from a decision of Kennedy, J., dated the 8th of June 1877, granting an application under s. 327, Act VIII of 1859, to file an award.

The material facts were as follows:—

The plaintiff entered into partnership with the defendant for the purpose of working and carrying on the cultivation and manufacture of tea on the Lizziepore Tea Estate at Darjeeling, of which they were the owners in certain shares, on the terms and conditions contained in a deed of partnership, dated the 12th of April 1876, which was executed by the parties, and also registered, in Calcutta. By the deed the defendant was appointed manager of the tea garden, and it was agreed that both parties should reside on the estate. The deed contained a provision for a reference to arbitration in case of any doubt, difference, or dispute arising between the parties in connection with the partnership. Differences having arisen, steps were taken by the defendant for a reference to arbitration, and arbitrators were appointed and an award made; but the High Court refused to file it in consequence of some irregularity in the arbitration proceedings. The negotiations which resulted in the present award were opened by the plaintiff through his solicitors on the 29th December 1876, on which date they wrote to the defendant, proposing a reference to arbitration, and specifying the following questions as those on which the decision of arbitrators was desirable: "1*st*, whether you are bound forthwith to execute a mortgage to Mr. Fraser of your rights

and interest in the estate in terms of the deed of partnership? *2nd*, whether you are bound to furnish accounts and estimates to Mr. McIntosh as agent? *3rd*, whether you are liable to Mr. Fraser for any, and what, sum in respect of money misapplied, for damage caused by your conduct, or costs incurred thereby? *4th*, whether the partnership ought not to be dissolved, and if so, upon what terms?" The defendant, through his solicitor, Mr. Leslie, thereupon notified to the plaintiff that he had appointed Mr. Shephard of Kurseong as arbitrator on his behalf, and the plaintiff then appointed Mr. Kellner as his arbitrator. Mr. Shephard, however, subsequently refused to act, and as the defendant omitted to appoint another arbitrator, Mr. Kellner, in accordance with the provisions of the arbitration clause in the deed of partnership in such a case, appointed Mr. Reily to act as arbitrator for the defendant. The arbitrators duly proceeded with the arbitration in Calcutta, and on the 4th of April Mr. Kellner received two telegrams purporting to be sent by the plaintiff and defendant respectively to the arbitrators, the terms of which were "stay further proceedings, arrange matters here." The plaintiff subsequently attended before the arbitrators, and formally demanded their award, explaining that the telegram was sent by him on considerable pressure being brought to bear on him by the defendant and in ignorance of its possible effect.

The arbitrators published their award in Calcutta on the 7th of May 1877 as follows:—

"We find as a fact that there is due from Archibald Kellie to Duncan Donald Fraser the sum of Rs. 19,776-5-11, and award that the share of Archibald Kellie in the partnership property shall stand charged with the payment of that sum, and in accordance with the provisions of the partnership deed between the said parties, that the said Archibald Kellie shall forthwith execute a further mortgage of his share and interest in the partnership property, containing the usual covenants and powers, in favour of the said Mr. Fraser; and we further find that Kellie has committed a breach of the partnership deed in more than one instance, and still persists in a line of conduct fatally prejudicial to the interests of the partnership property, and we

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therefore award a dissolution of such partnership from the 7th day of May 1877, upon the footing as regards accounts that each partner is entitled to his proportionate share of the sale proceeds of the said concern subject as to Kellie's third share to his debt to Fraser as aforesaid; that Kellie be removed from the managership of the said concern, and that a competent manager be appointed by Mr. McIntosh, the Calcutta agent of the Garden. We further award that the entire partnership estate, as a going concern, be sold on an early date by public auction by Messrs. Mackenzie, Lyall & Co., for the best price that it will fetch; that each partner shall be at liberty to bid for and to purchase the said concern; and further that the conditions of sale as regards amount of deposit and otherwise shall be such as the parties may agree upon; and if they cannot agree, then either of the parties shall be at liberty to refer the conditions of sale to the Court in which this award may be filed for settlement, and the conditions so settled shall be the conditions on which the sale shall take place. And we further award that if either of the partners shall become the purchaser, he shall be at liberty to set off against the purchase-money his share of the sale proceeds of the said concern, and as regards costs of the arbitration, we award that they shall be borne by Mr. Kellie."

Mr. *J. D. Bell* for the plaintiff.

Mr. *T. A. Apcar* for the defendant.

KENNEDY, J.—In this case a question of considerable difficulty has been raised, and I should much prefer to have had a longer time to have considered the matter; but there seems to be strong reason why this particular matter should not be kept in suspense. On the 13th of April 1876, the parties entered into partnership, and on the 22nd of July, the gentleman who now opposes making this award a rule of Court, himself took proceedings to compel the appointment of arbitrators, and has conducted them with so much ability that now more than ten months after the initiation of these proceedings, he is still in a

position to resist the confirmation of the award made under them. If, however, I had thought my judgment in this matter would be conclusive upon the questions between the parties, I should have tried to see if further light could not be thrown upon the question. Possibly I should have been able to obtain the assistance of some other Judge, so that Mr. Kellie's objections might not have been finally determined by my single opinion. But on consideration of the authorities I am clearly of opinion that if I make an order which I have no jurisdiction to make, or if I confirm an award the subject-matter of which had been withdrawn from the arbitrators, I may be corrected by the Appellate Court.

The questions which arise before me appear upon the face of the two petitions presented in the case, one of which is supplementary to the other, and merely brings on the record the original partnership deed which was referred to in the first, and apparently not then filed with the record by some mistake.

An application was made to me yesterday when the case was called on to postpone the hearing in order to enable the respondent to file affidavits by way of showing cause. The affidavit used in that application, however, disclosed no possible ground for belief that the respondent would be in a position to show cause; it did not allege that he had any ground for opposing the application on the merits; and it did not even contain the ordinary averment that the application was not for the purposes of delay. When I look at the proceedings set forth in the petition I can very well understand that any solicitor of this Court would have been unwilling to make an affidavit to that effect.

What we have here to consider is this: there was first the execution in Calcutta by the parties of a deed which contained an arrangement for their carrying on in partnership certain tea plantations in Darjeeling: the parties also thereby provided for arbitration in case of future differences; and they did according to the terms of these provisions appoint arbitrators, who made an award. The present application is made under s. 327 of the Criminal Procedure Code to have that award filed in Court, and the question is whether this can be done.

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The principal objection which was raised was, that this Court had no jurisdiction to entertain the application, and unquestionably the language of that section is as well calculated to create confusion as can well be imagined. It seems wholly to have omitted the consideration of the great difficulties which might arise in case of different matters which might properly be considered in different Courts. One knows enough of the history of this particular Act to be aware that no very careful legal revision of some of these sections was applied, and therefore that it would be hardly safe to apply the ordinary course of construction with very great strictness. Sir Barnes Peacock was, I believe, a member of the Council at the time; but I have always understood that he was in no respect responsible for the language of this Act, which I have always understood to be the production of a distinguished civilian. When then we find a change of language from that in s. 326, where the words "any Court" occur, to that in s. 327, where the words are "the Court," I think it would probably be unsafe to assume as certain, on the mere strength of the change of words, that the draftsman, by the use of different words, intended to define different powers and a different jurisdiction. I should be more disposed to think that these two sections, *in pari materia*, were intended to be enforced by the same tribunals, and that the change of language was merely *per incuriam* than to narrow the effect of s. 327 by reason of its difference in expression from s. 326. I am not certain that a different construction could be put on s. 327. It might possibly; but where there is a change of language, one would naturally expect it to be caused by a change of intention, and therefore would generally try to discover what this changed intention was.

I cannot believe, however, that the true meaning of the section was, that if in any particular case the whole cause of action arose within one jurisdiction, while the defendant resided in another, neither of the Courts should have jurisdiction; and yet that result would, of necessity, follow if one were by the light of s. 326 to make s. 327 exclude any case in which more than one Court would have jurisdiction. In fact, in this case, it would exclude the Darjeeling Court, which was pressed on me as the

proper forum, as I shall presently show, because here the High Court would, under the Charter, have jurisdiction in a suit. Many cases of very grave inconvenience might be suggested. In fact, it would make the section rarely applicable at all if I were to put on it that narrow construction. If, indeed, I were to meet that narrow construction by another still narrower, and hold that as the parties to the award are not properly described as plaintiff and defendant in a proceeding of this kind, no jurisdiction existed by reason of the residence of either party: on this construction, no doubt, there would be power to file the award in the Court within the local limits of whose jurisdiction the whole cause of action had arisen; but then, unless the whole arose within the local limits of one Court, the section would be inapplicable.

I should be unwilling so far to nullify that provision by either of these constructions, and I cannot believe that it was the meaning of the framers of the Act. Therefore, I think, if this Court has jurisdiction in the matter referred to arbitration, then it is a Court which has jurisdiction to file the award. And the question then arises—Has this Court jurisdiction in the subject-matter of the award?

I don't think that one can say that, where the Court has the power of dealing with the entire subject-matter of suit, it can be said to have no jurisdiction, merely because it might be necessary, if the matter were to come to Court by way of suit, to obtain the leave of the Court to sue. By the 12th clause of the Charter, the Court is empowered to receive, try, and determine suits of every description where the cause of action has arisen wholly or in part within its jurisdiction. It has jurisdiction over all those matters, although restrained from exercising that jurisdiction in cases where the whole cause of action did not arise here, by the necessity of obtaining the prior leave of the Court.

I take it that 'jurisdiction' means the power of receiving, trying, and determining suits; but that the necessity of obtaining the leave of the Court only limits the mode of exercising that power; and thus that, as, according to the true meaning of the 327th section, its effect is to confer the power upon every Court

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in which a suit in respect of the subject-matter of the award may be instituted, we are brought to the question whether in this case a part of the cause of action has not arisen within the jurisdiction of this Court so as to let in the provisions of the Charter in such cases. I think that, unquestionably, a part of the cause of action has arisen here by the execution of the document by which the rights of the parties accrued. I know that, by modern English decisions, the words "cause of action" in recent English Statutes have recently received a meaning different from that which was formerly put on them by the former English decisions on earlier Acts and by the former decisions here. Of course, in any observations I make, I may be taken to have no doubt that the later decisions are right in so holding. But we, in this Court, must look at the Civil Procedure Code and the Charter, and remember that they were drawn at the time when the earlier cases were unimpeached, save so far as at the time of the Charter they were impeached by the opinion of Mr. Justice Holloway in *DeSouza* v. *Coles* (1)—an opinion in which he seems to have been led astray by his habit of seeking for guidance from any law rather than that which was likely to be in the minds of the framers of Indian Statutes. I think, bearing this in mind, it is impossible not to hold that "cause of action" in both those enactments has the more extended meaning; and indeed, on the face of the Charter itself, it is clear that the earlier meaning must be given to the words in the 12th clause, and that we must hold that it is not the breach alone which constitutes the right to sue, but the entire bundle of facts which would, of necessity, be proved. If the breach alone is the cause of action, the words "*part* thereof" would in most cases be meaningless. This question has been recently discussed in *Mulchand Joharimal* v. *Suganchand Shivdas* (2), where the Court reviewed the recent English decisions and came to the same conclusion as that at which I have arrived.

I have thus come to the conclusion that, if we find a contract made here, and breach or other consequences occurring elsewhere, this Court has jurisdiction over the matter; but it is a

(1) 3 Mad. H. C., 384. (2) I. L. R., 1 Bom., 23.

jurisdiction not to be exercised in ordinary suits without leave to sue If there were nothing more in the case, I should have no hesitation in deciding that this Court has jurisdiction; but as the partnership in this case was chiefly concerned with immoveable property in Darjeeling, I felt great difficulty in my way in consequence of the decision of the Appeal Court in the case of *The Delhi and London Bank* v. *Wordie* (1.) I was counsel for one of the defendants in the Court below, but not on the appeal, and I had not sufficiently studied the difference in the grounds of the decision in the lower Court and on appeal. Upon careful examination I, however, think that whatever may have been the opinion of Mr. Justice Phear, the Appeal Court has left untouched that which was supposed to be the result of earlier decisions. It has not in any way affected *Bagram* v. *Moses* (2) or *Ramdhone Shaw* v. *Nobinmoney Dossee* (3). These cases are left where they were before. In the case of *The Delhi and London Bank* v. *Wordie* (1), Phear, J., said :—"The plaintiff wants to have a sale of the property effected, and for that purpose to have the obstacles, which arise by the conduct of Morell and Lightfoot and otherwise than from the trustees, removed by the Court. So far as the substance of this suit is concerned, the plaintiff's case is the same as if the trustees were out of the way, and Morell and Lightfoot had bound themselves by covenant, on sufficient consideration, to sell the property and divide the proceeds according to the terms of the deed of 14th May 1875, among their creditors, of whom the plaintiff is one. The like transaction with the plaintiff as the sole creditor would manifestly be of the nature of a mortgage, and a suit by the plaintiff on the footing of it to obtain a realization of the charge by sale would be a suit for land within cl. 12 of the Letters Patent. It follows, I think, that the present suit is also a suit for land."

If that decision had been upheld by the Appeal Court in that form, I should have felt very great difficulty in distinguishing that case from the present. But the current of the opinion of the Court above seems all through the course of the argument to be adverse to the view taken by Mr. Justice Phear.

(1) I. L. R., 1 Calc., 249. (2) 1 Hyde, 284. (3) Bourke, 218.

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Garth, C. J., during the argument, referred to the case of *Abbott v Abbott* (1), which is an important case, and which he had himself argued while at the bar. In that case there was an order in a Consular Court directing the receiver to sell land beyond the jurisdiction; that was held not beyond the power of the Court. Then he asked "have there been any cases here in which this Court has decreed specific performance of contracts relating to land," and he is referred to *Ramdhone Shaw* v. *Nobinmoney Dossee* (2). Again the Chief Justice says: "I have some doubt at present whether a 'suit for land' means more than a suit for possession of land, and whether it includes suits relating to or concerning land. Here, however, you ask for possession; I can understand a receiver being appointed to receive rents where another person is in possession, but here you want a receiver put in possession." That does not appear to be the case here. Then further on we find the Chief Justice says:—"It appears to me that, as to the 2-16ths, it is a suit for land, and even as to the rest I have great doubt whether it is not. What do you say as to Lightfoot's share." And in the final, formal and considered judgment of the Court, it is said:—"The express purpose of the suit is to compel the sale of the whole of the land conveyed by the trust deed, including Lightfoot's share. But then Lightfoot objects that his share is not subject to the trust at all, because Morell had no power or authority to deal with it; and, therefore, one of the main points which the plaintiffs seek to establish, and which they ask the Court to decide, is the title of the trustees to Lightfoot's share. Surely in that respect the suit is, strictly speaking, one 'for land.' But then the plaintiffs say that is not the sole or primary object of the suit, and that as regards Morell's share in the property, which is by far the largest portion of it, there is no question as to the trustees' title. But it was repeatedly, during the argument, put to the learned counsel for the plaintiffs, and distinctly admitted by them, that it would be impossible for the Court to deal effectually with the case unless Lightfoot's share were included as well as Morell's,"—that is to say, there being a

(1) L. R., 6 P. C., 220. (2) Bourke, 218.

question in that case whether anything had passed to the trustees by the deed in respect of Lightfoot's share, the Court held that, as to that share, it was a suit for land. But I do not think there can be much doubt that if it had not been for that share, the judgment would have been in favour of the jurisdiction.

On the whole, then, I think that, with respect to the question of jurisdiction, I am bound to entertain the application.

The only other point of any importance was that upon the face of the petition there appeared to have been a revocation. I don't think there was, so far as I can understand; neither party conceived that the language they used was an absolute revocation of the authority. A revocation ought to be clear and distinct. We have it on the face of the respondent's own affidavit that, subsequent to the award having been made, he sent a letter of revocation. It came indeed too late to have effect, but it does seem to show that he did not believe the telegram to be a revocation, and the language is so vague and ambiguous that I would rather consider it to mean that the scene of the arbitration should be removed from Calcutta to Kurseong, and that it requested the arbitrators to arrange matters at Kurseong—not a statement that the litigants themselves would arrange their differences. It seems to me, having regard to what is on the face of the award with respect to Kellie and Fraser, that this is not a sufficient revocation; and I am by no means certain that since the Contract Act the unlimited right of revocation which existed at Common Law may not be taken away in such a case as this.

There can be no doubt that if I am wrong I can be corrected by the Appellate Court. There is a judgment of the Full Bench in *Sashti Charan Chatterjee* v. *Tarak Chandra Chatterjee* (1), where there was great difficulty raised as to the power of appealing from an order affirming an award. But clearly it would not touch the case where the Court, which made the order acted without jurisdiction.

With respect to costs, I much doubt whether I have any power. I mean that the party who seeks to have the award made a rule

(1) 6 B. L. R., 315.

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of Court does so for his own security. It seems to me that it is analogous to the registration of a deed. If I thought I had jurisdiction in these proceedings so to do, I should be much inclined to give costs to the applicant; but I don't think that I have power to give costs against the opposing party. Each party will bear his own costs on scale No. 2.

From this decision the defendant appealed.

Mr. *Jackson* and Mr. *T. A. Apcar* for the appellant.

Mr. *J. D. Bell* and Mr. *Evans* for the respondent.

Mr. *Jackson* for the appellant.—S. 327 of Act VIII of 1859 stands alone; the other sections in the same chapter are not incorporated into it as they are expressly into s. 326—*Chowdhri Murtaza Hossein* v. *Bibi Bechunnissa* (1). The learned Judge in the Court below thinks that the words of this section—"the Court having jurisdiction"—cannot have a narrower construction given to them than the words "any Court having jurisdiction" in s. 326 would bear. But taking them by themselves, and leaving out of consideration as immaterial the question of the intention of the framers of the Act, it is submitted that the Court having jurisdiction "in the matter to which the award relates" must be taken to mean the Court having jurisdiction over the whole subject-matter of the award; see *Gangappa* v. *Kapinappa* (2). That Court would in this case be the Darjeeling Court. The jurisdiction meant is not a personal jurisdiction, but a jurisdiction which can be enforced. The only ground of jurisdiction in Calcutta is that the deed was executed in Calcutta; but the result of holding that that was sufficient would be to say that jurisdiction could be given by consent of parties,— by their signing a deed in Calcutta,—to a Court which would otherwise have no jurisdiction. Consent cannot give jurisdiction. [GARTH, C.J.—Is not the subject-matter of the award the differences which have arisen between the parties?] Yes, partly, but in arbitrating on those differences the

(1) L. R., 3 I. A., 209. (2) 5 Mad. H. C. Rep., 128.

arbitrators award a sale of the land at Darjeeling, and it is submitted that a proceeding taken to enforce such an award is practically a suit for land within the meaning of cl. 12 of the Letters Patent. [MACPHERSON, J.—I see that, by the terms of the deed, both the parties were to reside on the tea garden.] Yes, that is so, and the residence of the defendant out of the jurisdiction of this Court would distinguish the present case from all those in which the Court has held it has jurisdiction, for in all such cases it will be found that the defendant resided within the jurisdiction. This case comes within the principle of the decision in *The London and Delhi Bank* v. *Wordie* (1). There is nothing in the judgment on appeal in that case to cut down the effect of the decision in the lower Court as to the suit being a suit for land. In that case there were circumstances in favour of the jurisdiction which are absent in the present case. The persons to whom the property was stated to have been conveyed were subject to the jurisdiction. Here they are not. In this case part of the award is to remove the manager of the tea estate and appoint another; just as in that case part of the relief sought was to remove the trustees and appoint others. [GARTH, C.J.—You say we could not do that?] Not in a case where both the parties and the land are out of the jurisdiction. The order could not be enforced. [GARTH, C.J.—Could we not make an order for sale of the land, although the purchaser might afterwards have to sue for possession in another Court. The sale could take place without meddling with the land.] That might have been done then in *The Delhi and London Bank* v. *Wordie* (1). [GARTH, C.J.—As to a 14-anna share of the property in that case, I thought there was jurisdiction.] In that case the defendant Morell, the owner of the 14-anna share, was subject to the jurisdiction. [MACPHERSON, J.—In that case, owing to the title of the trustees to Lightfoot's 2-anna share being disputed, a question of title to that portion of the property arose, and therefore the suit was held to be a suit for land.] In all the cases referred to in that case in favour of the Court having jurisdiction, the parties against whom orders were

(1) I. L. R., 1 Calc., 249.

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made were subject to the jurisdiction, as in *Bagram* v. *Moses* (1), *Abbott* v. *Abbott* (2). Suits for foreclosure are suits for land according to the decisions of this Court on the words of the Letters Patent, which are to be adhered to rather than the English decisons. *Paget* v. *Ede* (3) has been held not to apply here. If this Court has jurisdiction in cases where the only cause of jurisdiction is that a deed was executed in Calcutta, it will be nullifying cl. 12 of the Charter.

Again, the leave of the Court should have been obtained in this case before applying to file the award. The case seems to have been treated in the lower Court as if leave had been obtained; but there is no more reason why leave should be assumed to have been obtained in this case than in a case where a plaint has been admitted. It would be necessary in filing a plaint in such a suit as this to obtain leave of the Court to sue; and such leave could not be obtained after the plaint has been admitted. [MACPHERSON, J.—I think it has been so held.] Then as to revocation, the telegrams amounted to a revocation. If the plaintiff thought there was no revocation, there was no necessity for him to complain of the telegram as having been wrung from him under pressure. [MACPHERSON, J.—Was it not rather a mere postponement of the proceedings, which might have prevented the arbitrators from proceeding with the arbitration in Calcutta?] It is submitted there was a sufficient revocation.

Mr. *T. A. Apcar* on the same side.

Mr. *Bell* for the respondent.—The deed creating the contract of partnership was executed in Calcutta. A suit relating to that contract is not a suit for land. There are many matters relating to such a partnership which are done in Calcutta, as selling the tea, &c. It is a contract relating to matters partly in and partly out of the jurisdiction. If the plaintiff had wished to sue for a dissolution of partnership, he could, it is submitted, have sued in this Court, and a decree in such a suit would be one *in*

(1) 1 Hyde, 284. (2) 6 L. R., P. C., 220. (3) L. R., 18 Eq., 118.

personam, which this Court could make. See *Penn* v. *Baltimore* (1) and other cases there cited. [GARTH, C.J.—Your difficulty is that the person against whom you want the decree is not resident in the jurisdiction. If he were, those cases would apply.] It is submitted they apply by reason of the contract having been entered into in the jurisdiction—*Gopikrishna Gossami* v. *Nilkomul Banerjee* (2). Parties entering into a contract in Calcutta thereby render themselves subject to the jurisdiction, with the restriction that if the performance is not to take place in Calcutta, leave to sue must be obtained. [GARTH, C.J.—Is there any case in which the English Courts have exercised their jurisdiction as in *Penn* v. *Baltimore* (1) against parties out of the jurisdiction?] The fact of a man having entered into a contract in the jurisdiction is sufficient to give the Court such power over him wherever he may be. In such a case part of the cause of action arises in the jurisdiction, so as to entitle a plaintiff to sue there. Then the Court being so seized as it were with jurisdiction, it is immaterial whether or not leave is obtained, because the seizure of jurisdiction enables the Court to operate upon the person in the way which has often been done in England. The restriction as to obtaining leave to sue is one which is put on the plaintiff merely for convenience. Want of leave does not take away the jurisdiction of the Court to pass an order *in personam*. [GARTH, C.J.—If we passed such an order here, could it be enforced by the Court at Darjeeling?] It is submitted that it could. [MACPHERSON, J.—If it were a decree it could be executed, no doubt, by the Darjeeling Court in the same way as a decree of that Court, but there would be considerable difficulty in enforcing an order, as for instance an injunction, prior to decree.]—Under s. 9 of the Charter Act, 24 & 25 Vict., c. 104, the High Court has the same power as the Supreme Court had, and that was the power of the Court of Chancery. Having power to pass the order, the Court would surely have power to enforce it. Such an order could probably be enforced under s. 206, Act VIII of 1859. What the plaintiff seeks for is an order relating

(1) 1 Ves. Sen., 444; 2 White and Tudor, L. C., 4th Ed., 923.
(2) 13 B. L. R., 461.

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to certain breaches of a contract made in Calcutta; he does not seek a declaration of any title to, or with respect to possession of, any land; he does not ask this Court to give possession; that can be obtained by the purchaser from the Darjeeling Court. As to s. 327, the matter to which the award relates is that which was proposed for arbitration: see the questions referred. It is submitted that those are matters over all of which the Court has jurisdiction, and therefore it has jurisdiction to file the award. The section lays down a special procedure, and that is another reason why leave to sue is not necessary, for the other side have notice of the application to file the award and can show cause against it; here it differs from the filing of a plaint, of which no notice is necessary, and it is therefore only convenient that leave should be obtained in certain cases.

The learned Counsel then contended on the merits of the case that there had been no revocation, and that the telegrams merely showed an intention to change the venue of the arbitration.

Mr. *Evans* on the same side. The Court has jurisdiction in this case subject to leave. The subject-matter of the award is practically a dissolution of the partnership and the matters usually incidental thereto, including a sale of the partnership assets. A suit for dissolution of the partnership could, no doubt, be brought here with leave of the Court, and it would have power to wind it up, and for that purpose to deal with all the partnership assets. Could it be said that the mere fact of a piece of land, portion of the assets, being out of the jurisdiction, would prevent it having that power. That power is a necessary incident of the winding up and realization of assets. In England land as a partnership asset would be treated as personality: it would make no difference whether the assets consisted of money or land; see Lindley on Partnership, 671. In a suit for dissolution of the partnership, this Court would have had power so to treat the land. [GARTH, C.J.—And that would have been a suit for an order to change the land into money, not a suit for land.] Just so. [MACPHERSON, J.—This is not the same as a suit for winding up a firm in Calcutta. These

parties have never carried on business here, and are not resident here.] It is submitted that the Court could wind up a partnership not only where there is personal jurisdiction, but where part of the cause of action has arisen in the jurisdiction. We might have sued on the award, or at any rate have sued for a declaration that the partnership was dissolved as ordered by the award. The cases of *Macrae* v. *Macniell* (1) and *Macdonald* v. *Scott* (2) are cases in which orders were made by this Court with respect to land in the mofussil. In the former case the defendant was not personally subject to the jurisdiction. [MACPHERSON, J.—He lived on board his steamer, which was in the river, and he did business, and had a ticket office, in Calcutta.] He was described as residing out of the jurisdiction, and the jurisdiction was founded on the fact that part of the cause of action arose in Calcutta. Here part of the cause of action arose in Calcutta, and if the plaintiff had brought a suit, he would have obtained leave. He had to file an award for which there is a special procedure, and no provision for obtaining leave to file it. The decision cited in the Madras High Court was not argued nor considered. If a plaint would have been thought good in this matter if we had sued, then this Court has jurisdiction, although no leave has been obtained. No doubt, the execution of the deed was a part of the cause of action; see *Mulchand Joharimal* v. *Suganchand Shivdas* (3), where all the cases as to cause of action are cited.

Mr. *Jackson* in reply.—The words of s. 327 are not only "having jurisdiction," but "having jurisdiction in the matter to which the award relates." The matter to which the award relates is not the partnership deed, but the tea garden at Darjeeling. The inference from the judgment of the Court below is, that if the words of the section are construed literally, the Court would have no jurisdiction. If the execution of the deed gives jurisdiction, this Court might have jurisdiction with respect to land situated anywhere, for instance in California. But in such a case who would give possession of the land sold? An

(1) Unreported. (2) Unreported. (3) I. L. R., 1 Bom., 23.

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award, however, is not a suit. The decision of the Madras High Court should be followed in this case. According to that case this Court has no jurisdiction.

Cur. adv. vult.

The following judgments were delivered—

GARTH, C.J. (after stating the facts continued).—The appellant, Mr. Kellie, contends—

1*st*.—That this Court had no jurisdiction to confirm the award, and

2*ndly*.—That the authority of the arbitrators was revoked by both parties before the award was made.

In support of the first objection, it has been argued that the only Court competent to confirm the award under s. 327 was the Court in which a suit must have been brought to settle the differences between the parties, if those differences had not been referred to arbitration; and that as the subject-matter in dispute was a tea garden at Darjeeling, and as both the litigants were resident there, the suit would have been a suit for land, and must have been brought in the Darjeeling district, and therefore that the Darjeeling Court was the only one capable of confirming the award.

The answer to this contention on the part of Mr. Frazer was that the suit under such circumstances would not have been a "suit for land" within the meaning of cl. 12 of the Letters Patent, and that as a part of the cause of action arose in Calcutta, inasmuch as the deed of partnership was executed there, the High Court might, although Mr. Kellie was resident at Darjeeling, have given leave to Mr. Frazer to bring this suit in the High Court; and that any Court in which such a suit might have been brought would have been "the Court having jurisdiction" over the matter in dispute within the meaning of s. 327.

Upon this point, we have been referred to several authorities, some of which have been discussed by the learned Judge in the Court below, and particularly to the late case of *The Delhi*

and London Bank v. *Wordie* (1), where it was held that a suit brought for the purpose of compelling the sale of a trust property was a "suit for land." It will be observed, however, that in all, or almost all the cases upon which the appellant relies, the suit was brought for the purpose of acquiring the possession of, or of establishing a title to, or an interest in, the property which was the subject of dispute, more particularly in the case of *The Delhi and London Bank* v. *Wordie* (1), where the object of the petitioner was to establish the title of certain trustees to a share in a portion of the trust property claimed by a person of the name of Lightfoot, and the establishment of this title was an essential element of the entire claim.

Now, in this case, it clearly appears, both from the description of the matters in difference and from the award itself, that Mr. Frazer's real object was to remove Mr. Kellie from the management of the partnership property, and to enforce a dissolution of the partnership upon such terms as the arbitrators should think proper. He did not seek to obtain possession of, or to acquire a title to, the tea garden, because that was already the property of the partnership, and the effect of the award was only to dissolve the partnership, and to dispose of the partnership property upon what they considered the most just and reasonable terms. I consider, therefore, that any suit instituted by Mr. Frazer to carry out these objects would not have been a "suit for land," properly so called; and that as the High Court might have given Mr. Frazer leave to bring such a suit in the High Court, that Court had also jurisdiction, under s. 327, to confirm the award.

As regards the other point, *viz.*, the alleged revocation of the submission to the arbitrators, I am of opinion that the evidence relied on by the appellant is not sufficient to justify us in finding that a revocation did in fact take place. It is true that, pending the proceedings, a telegram was sent from Darjeeling by both parties to Calcutta in these words, "Stay further proceedings; arrange matters here;" but having referred to the circumstances under which that telegram was sent, and to the

(1) I. L. R., 1 Calc., 249.

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subsequent correspondence and conduct of the parties, we do not consider that this telegram operated, or was ever intended to operate, as an absolute revocation of the submission.

I think therefore that the appellant has failed upon both grounds, and that the appeal should be dismissed with costs on scale 2.

MACPHERSON, J.—I also think that this appeal must be dismissed.

A suit the object of which was to deal with the matters, the subject of this arbitration, might certainly, in my opinion, have, with the leave of the Court first obtained, been instituted on the original side of this Court. The partnership deed having been executed in Calcutta, it seems to me that, according to the current of decision here, it is impossible to say that no part of the cause of action arose within the local limits of the ordinary original civil jurisdiction.

Of course if the suit were a suit for land, within the meaning of s. 12 of the Letters Patent of 1865, there would be no jurisdiction, the whole land lying in Darjeeling. But it is not a suit for land within that section. There is no dispute as to the title to the land. The questions at issue relate to the partnership between Kellie and Frazer, the mode in which its business has been and ought to be conducted, and the adjustment of accounts and winding up of the partnership. The mere fact that the object of the partnership was the carrying on of a tea concern does not make a suit for adjustment of accounts and dissolution a suit for land. If it did, then this result would follow that, although all the members of a partnership were permanently resident in Calcutta, and the chief business of the partnership was, at the time of suing, and always had been, conducted in Calcutta, a suit for an account and dissolution would not lie here, if one asset of the partnership happened to be an indigo factory or a tea garden in the mofussil. Yet, in the case suggested, there can be no manner of doubt a suit could be entertained by this Court on its original side; and such suits have, in fact, been repeatedly entertained.

The peculiarity in the present case is that the defendant

Kellie is not personally subject to the jurisdiction at all, save by reason of part of the cause of action (to wit, the execution of the partnership deed) having arisen in Calcutta. Had he been personally subject, by reason of residing in Calcutta, probably the question which has been raised would never have been suggested.

Some discussion has taken place as to the effect of the judgment of the Court in the case of *The Delhi and London Bank* v. *Wordie* (1). But I cannot gather from the report that the decision of the Appellate Court in any way modified or altered the earlier decisions. For the only point actually decided by the Appellate Court is that as the owner of a two annas' share of the property denied that he had ever conveyed his share to the defendants, to whom it was alleged to have been conveyed as trustees, the question of title as to those two annas was directly in issue, and therefore the suit was a suit for land and could not be entertained.

On the whole, I have no doubt that a suit might, with the leave of the Court first obtained, have been instituted here. And if a suit would have lain there, it appears to me that the Court had jurisdiction under s. 327 to order this award to be filed. I agree with Mr. Justice Kennedy in declining to attach to the words of that section "the Court having jurisdiction in the matter to which the award relates" the limited and a special meaning contended for, and in construing them as meaning *any* Court having jurisdiction to entertain a suit for the matter to which the award relates.

I further agree in the opinion that there was no revocation of the authority to the arbitrators.

Appeal dismissed.

Attorneys for the appellant: Messrs. *Orr* and *Harriss*.

Attorneys for the respondent: Messrs. *Chauntrell*, *Knowles*, and *Roberts*.

(1) I. L. R., 1 Calc., 249.

Before Sir Richard Garth, Knight, Chief Justice, and Mr. Justice Markby.

1877
July 15.

IN THE MATTER OF THE PETITION OF JANOKEY NATH ROY.

Appeal—Presidency Magistrates' Act (IV of 1877), s. 41—Prosecution—Sanction of Judge—Jurisdiction of High Court.

No appeal lies from the order of a Judge directing a prosecution under s. 41 of the Presidency Magistrates' Act.

IN the suit of one Bhoobun Mohun Neogy *v.* Janokey Nath Roy an application had been made to Mr. Sconce, one of the Judges of the Calcutta Small Cause Court, to direct the prosecution of the defendant (the present appellant) for perjury and forgery. Mr. Sconce refused to direct such prosecution; and the plaintiff applied *ex parte* under s. 41 of Act IV of 1877 to Mr. Justice Kennedy, sitting on the Original Side of the High Court, for an order that he might be at liberty to prosecute the defendant, which was granted. Against this order the defendant presented a petition of appeal, on the grounds that the learned Judge had no jurisdiction to make the order; that, under the circumstances of the case, the order ought not to have been made; and that the appellant ought to have been allowed an opportunity of being heard against the order being made.

Mr. *Branson* (with him Mr. *Bonnerjee*) moved to admit the appeal.

Mr. *Branson.*—It is true that neither under the Criminal Procedure Code, nor the general law, has the Court any right to interfere with the discretion of a Judge, but the order amounts to a judgment. The word 'judgment' in clause 15 of the Letters Patent of 1865 has been held to mean a decision, whether final or preliminary, or interlocutory. The order is one creating jurisdiction, and is to that extent final; and so far there is a right of appeal. The learned Counsel referred to

The Justices of the Peace for Calcutta v. *The Oriental Gas Company* (1), *Hadjee Ismail Hadjee Hubbeeb v. Hadjee Mahomed Hadjee Joosub* (2); *Mowla Buksh* v. *Kishen Pertab Sahi* (3); and to *Barkat-ul-lah Khan* v. *Rennie* (4).

The judgment of the Court was delivered by

GARTH, C.J.—We are clearly of opinion that no appeal lies in this case, and that we ought not to grant leave to admit the appeal. Leave granted by a Judge to institute proceedings is not a 'judgment' within the meaning of cl. 15 of the Charter. If authority were wanted, the case of *The Justices of the Peace of Calcutta* v. *The Oriental Gas Company* (1) would be ample authority for our judgment. But apart from that, this leave given by the Court is the creation of a late Statute, It is a power which did not exist when the Charter was passed. It is a power of a peculiar kind. The object is to check rash proceedings in criminal matters being taken. It gives power to take proceedings, which could not have been taken without leave. As the Legislature has not thought fit to give an appeal from such an order, we think that this appeal should not be admitted.

Application refused.

Attorneys for the appellant: Messrs. *Pittar* and *Wheeler*.

(1) 8 B. L. R., 433.
(2) 13 B. L. R., 91.
(3) I. L. R., 1 Calc., 102.
(4) I. L. R.. 1 All.. 17.

APPELLATE CIVIL.

Before Mr. Justice Markby and Mr. Justice Prinsep.

1877
JUNE 21.

KALLY PROSONNO HAZRA (PLAINTIFF) *v.* HEERA LAL MUNDLE (DEFENDANT).*

Limitation—Act IX of 1871, *ss.* 20, 21, *Sch.* II, *arts.* 167, 169—*Execution Proceedings.*

The word 'debt' in ss. 20 and 21 of Act IX of 1871 applies only to a liability for which a suit may be brought, and does not include a liability for which judgment has been obtained: therefore, where the last application for execution of a decree had been made on the 14th of December 1872, and a notice under s. 216, Act VIII of 1859, issued on the 19th of January 1873, and on the 28th of April 1873, the judgment-debtor filed a petition notifying part-payment, which petition was signed by the judgment-creditor,—*held*, in an application for execution made on the 27th of April 1876, that further execution was barred by limitation.

THIS was a suit in which the plaintiff, appellant, had obtained a decree on the 9th of January 1868. The last application for execution had been filed on the 14th of December 1872, and a notice under s. 216 of Act VIII of 1859 had been issued to the representatives of the judgment-debtor on the 19th of January 1873. On the 28th of April 1873 the judgment-debtor filed an application with the consent of the decree-holder, who appended his name at the bottom of the petition, notifying payment of a part of the decretal amount, and the execution case was struck off the file. On the 27th of April 1876 the judgment-creditor applied for fresh execution. The judgment-debtor pleaded limitation. The lower Appellate Court held that further execution was barred. The judgment-creditor preferred a special appeal to the High Court.

Baboo *Rashbehari Ghose* for the appellant.—The petition presented by the judgment-debtor, and signed by the judg-

* Miscellaneous Special Appeal, No 91 of 1877, from a decree of C. D. Field, Esq., Judge of Burdwan, dated 22nd December 1876, confirming a decree of Baboo Amrit Lall Pal, Munsif of that district.

ment-creditor, was in fact the acknowledgment of a 'debt,' and is therefore governed by ss. 20*a* and 21 of the Limitation Act. The period of limitation must, therefore, be computed from the date of the presentation of that petition.

The respondent was unrepresented; the pleader for the appellant, however, pointed out to the Court that the proviso to art. 169 of the 2nd schedule of Act IX of 1871 would have been mere unmeaning surplusage if limitation on part-payment of money under a decree had been already provided for under s. 21 of that Act.

The following judgments were delivered:—

MARKBY, J.—In this case, whilst execution proceedings were going on, the judgment-debtor filed a petition in Court notifying payment of a part of the sum due under the decree, and asking for a stay of execution for four months. The judgment-creditor signified his assent to this application by signing the petition which was granted. The question we have to determine on special appeal is, whether a new period of limitation runs either from the date of this petition under the provisions of s. 20 or from the date of the part-payment under the provisions of s. 21, Act IX of 1871. Both these sections are applicable to 'debts and legacies' only, and I do not think that the sum due under a decree is a 'debt' within the meaning of these two sections. It seems to me that the proviso to s. 21, which is general, would be unmeaning as applied to sums due under a decree; and the proviso to art. 169, sch. ii would also have been wholly useless if part-payment of money due under a decree had been already provided for under s. 21. Both these arguments, it is true, apply only to s. 21. But I cannot suppose that the word 'debt' is used in a different sense in two consecutive sections of the Act. I do not of course mean to say that the sum due under a decree may not sometimes be properly called a 'debt;' it is constantly spoken of as a judgment-debt; but taking the whole Act together, I think the 'debt' spoken of in ss. 20 and 21 is a liability to pay money for which a suit could be brought, and not for which judgment has been obtained. The Miscellaneous Special Appeal will be dismissed with costs.

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KALIY PROSONNO HAZRA v. HEERA LAL MUNDLE.

PRINSEP, J.—I am of the same opinion. I would only add that the fact that it has been thought necessary to make a special proviso in art. 169, sch. ii of the Limitation Act, seems to show that the ordinary law was not sufficient in this respect as regards decrees or orders of a High Court in its Ordinary Original Civil Jurisdiction. There is no such special provision for other decrees or orders. We cannot apply s. 20 or 21.

Appeal dismissed.

FULL BENCH.

Before Sir Richard Garth, Knight, Chief Justice, Mr. Justice Jackson, Mr. Justice Macpherson, Mr. Justice Markby, and Mr. Justice Ainslie.

1877 *July* 20.

MOHESH MAHTO AND ANOTHER (DEFENDANTS) *v.* SHEIK PIRU (PLAINTIFF).*

Special Appeal—Jurisdiction—Small Cause Court—Claim under Rs. 500—*Question of Title—Act XXIII of* 1861, *s.* 27—*Act XI of* 1861, *s.* 6.

No special appeal lies to the High Court in a suit cognizable by the Small Cause Court, although a question of title to immoveable property has been raised and tried in the Court below.

THIS was a suit for the recovery of Rs. 476, the price of certain sakhwa trees. A question of title had been raised and determined in the Court below in favour of the respondent. Upon a special appeal from this decision, Markby and Prinsep, JJ., referred the following point to a Full Bench: "Whether, having regard to the provisions of s. 27 of Act XXIII of 1861, a special appeal lies to the High Court in a suit of the nature cognizable by a Court of Small Causes, when a question of title to immoveable property has been raised and tried in the Courts below."

Baboo *Anandanauth Chatterjee*, for the respondent, took a preliminary objection to the hearing of the appeal, and con-

* Special Appeal, No. 1385 of 1875, against a decree of H.M. Boddam, Esq., Deputy Commissioner of Zilla Hazaribaugh, dated the 18th March 1876.

tended that no appeal would lie to this Court, inasmuch as the case was one cognizable by the Small Cause Court, being merely a suit for damages. The words of the Act are "that no special appeal shall lie from any decision or order in any suit of the nature cognizable in Courts of Small Causes.....when the debt, damage or demand for which the original suit shall be instituted shall not exceed five hundred rupees; but every such order or decision shall be final." It is true that a question of title was raised and tried, but it was simply raised incidentally in order to the determination of damages, and as the suit itself was merely for damages, no appeal lies—*Grant* v. *Modhoosudun Singh* (1) and *Lasmani Debia* v. *Mahomed Hafezulla* (2).

Baboo *Roopnath Bonerjee* for the appellants.—If the sole question raised and decided in this suit had been the plaintiff's claim to damages, it is clear that no appeal would lie to this Court. But the decree of the Court below was based upon a question of title, which, if it had properly arisen incidentally in a suit brought in the Small Cause Court, would not then have been finally concluded between the parties—*Bhoop Narain Sahoo* v. *Meer Mahomed Hossein* (3); and as this question of title had to be determined before a decree could be given, the appeal is admissible—*Pachoo Raree* v. *Gooroo Churn Dass* (4); see also *Dikshit* v. *Dikshit* (5) and *Ramchandra Raghunath* v. *Abajibin Rastya* (6).

The opinion of the Full Bench was delivered by

GARTH, C.J.—We are of opinion that as this was a suit cognizable by the Court of Small Causes, no special appeal lies to this Court, although a question of title may have been incidentally raised in it. The appeal will, therefore, be dismissed.

Appeal dismissed.

(1) 10 W. R., 79.
(2) 3 B. L. R., Ap., 96.
(3) 4 W. R., 60.
(4) 15 W. R., 556.
(5) 2 Bom. H. C. Rep., 4.
(6) 6 Bom. H. C. Rep., A. C., 12.

ORIGINAL CIVIL.

Before Mr. Justice Kennedy.

1877
July 19.

KOEGLER *v.* PROSONNO COOMAR CHATTERJEE.

Civil Procedure Code (Act VIII of 1859*), s.* 73—*Adding Parties—Amending Plaint.*

Under s. 73, Act VIII of 1859, a person is not liable to be added as a party to the suit, although he may be "likely to be affected by the result," unless he is also entitled to or claims some interest in the subject-matter of the suit.

APPLICATION on notice to amend a plaint by adding a party defendant to the suit.

The suit was instituted by the plaintiff, carrying on business in Calcutta under the name of Graf and Banziger against the defendant, carrying on business in Calcutta in the name of Ramchunder Chatterjee, to recover damages in respect of breaches of certain contracts made between the plaintiff and defendant for the delivery of wheat. In the petition in support of this application the plaintiff stated that, at the time of the institution of the suit, he was informed and believed that the defendant abovenamed was the sole partner of the firm of Ramchunder Chatterjee; that since the institution of the suit and service of summons on the defendant, the plaintiff had discovered that he was not the sole partner in the firm, but that he and one Ramchunder Chatterjee carried on the business in co-partnership. The present application was, therefore, made to have the plaint amended by adding the name of Ramchunder in the plaint as a party defendant to the suit.

The application was opposed both by the defendant and by Ramchunder Chatterjee who alleged, in separate affidavits filed by them, that they did not carry on business in co-partnership, but that the business was carried on by Ramchunder alone, the defendant Prosonno Coomar being his agent and manager; and that the contracts had been entered into by the defendant in that capacity.

Mr. *Bonerjee*, in support of the application, contended that the person the plaintiff alleged to be a necessary party might be added as a party under s. 73 of Act VIII of 1859.

Mr. *Stokoe*, for the defendant, contended that s. 73 did not apply to such a case as this, and that to grant the application would be practically to allow the plaintiff to wholly change the nature of his suit—to bring a new suit in fact.

Mr. R. *Allen*, for Ramchunder Chatterjee, contended that, according to the practice of the Court, he could not at this stage be added as a party. A motion like this is not a hearing within the meaning of s. 73. [KENNEDY, J.—I think it is clear that it is.] Then it is not a case to which s. 73 applies. The plaintiff finds he has made a mistake and sued the wrong person, and now wishes to add the person he ought to have sued as a party: that would be to allow him to bring a totally different suit. It is submitted that would be perverting the meaning of the section.

Mr. *Bonnerjee* in reply.—The application should be granted, subject of course to payment of the costs by the plaintiff if Ramchunder is wrongly made a party; it is not for the defendants to choose whether they will be parties or not: the Court has discretion under s. 73 to make this person a party. The application is not made at a late stage of the case, or under circumstances which will prejudice the defendant in any way.

KENNEDY, J.—I have not been referred to any authority which shows me that the old practice with respect to the addition of parties to a suit has been retained. The Civil Procedure Code seems to have been introduced by the rules of this Court as laying down the entire practice. S. 73 of that Code is the only section which provides for adding parties, and by that section parties can only be added where they "may be entitled to, or claim some share or interest in the subject-matter of the suit, and may be likely to be affected by the result." Probably the framers of the Act had in their minds suits for land. I do not think, therefore, that a person who is not entitled to, and

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KOEGLER v. PROSONNO COOMAR CHATTERJEE.

who does not claim, any interest in the subject-matter of a suit can be made a party to it. By the old practice any number of persons who were necessary parties were considered as being parties having an interest in the matter of the suit, except in matters of contract. Under the Contract Act the distinction between joint and several contracts in respect of pleading has been abolished, and one party of any number, unless there be an express contract to the contrary, may be sued alone. In this case if the plaintiff can make out a partnership between the defendant and the person he wishes to have made a party, he will be able to recover against the person he has sued. If the person he has sued is only an agent, then the plaintiff having elected to sue the agent has no right to be allowed to join another person as principal; that would be a different suit. I must therefore refuse this application. I cannot see any reason why the original defendant should have appeared in this application; therefore he will get no costs. The other party who has opposed it must have his costs.

Application refused.

Attorneys for the plaintiff : Messrs. *Pittar* and *Wheeler*.

Attorneys for the defendant : Messrs. *Trotman* and *Watkins*.

Attorney for Ramchunder Chatterjee : Mr. *Farr*.

APPELLATE CIVIL.

Before Mr. Justice Prinsep.

1877 *July* 5.

DOORGA PROSAD MYTEE AND OTHERS (DEFENDANTS) *v.* JOYNARAIN HAZRAH (PLAINTIFF).*

Co-sharers—Ijaradar—Enhancement of rent—Beng. Act VIII of 1869, *s.* 18.

An ijaradar is entitled to enhance the rent of raiyats holding under him where there is no condition or stipulation in his lease precluding him from so doing.

* Special Appeal, No. 2601 of 1876, from a decision of Baboo Jadunath Roy, Subordinate Judge of Midnapore, reversing a decision of Baboo Annoda Prosad Chatterjee, Munsif of Chouki Danton.

One of several joint proprietors may, without making his joint proprietors parties, bring a suit for enhancement of rent against ryots holding under him, from whom he has been in the habit of realizing separate rents.

The Full Bench Ruling in *Doorga Churn Surma* v. *Jampa Dossee* (1) distinguished.

THE plaintiff, a farmer for a term of years, and one of several co-sharers entitled to the rent of certain property, brought a suit for the enhancement of his share of the rent. The plaintiff alleged that the proportionate part of the rent due to him had hitherto been paid exclusively to him by the defendants irrespective of the shares due to the other co-sharers, who were not made parties to the suit. The Lower Appellate Court gave the plaintiff a decree. The defendant preferred a special appeal to the High Court.

Baboo *Umakali Mukerjee* for the appellants.—An ijaradar of a fractional portion of an undivided estate cannot sue for enhanced rents, although in receipt of a definite portion of the rent, unless he makes his co-sharers parties to the suit—*Doorga Churn Surma* v. *Jampa Dossee* (1). An ijaradar cannot sue for a kabuliat for his fractional share; and therefore cannot sue for enhancement—*Surrut Soondery Dabea* v. *Watson* (2). If such separate suits were possible, it would result in the splitting up of the tenure without the consent of the tenant, but see judgment of Mitter, J., in *Indar Chandra Dugar* v. *Brindabun Bihara* (3). The co-sharers, at any rate, should have been made defendants—*Dookhee Ram Sircar* v. *Gowhur Mundul* (4) and *Raj Chunder Mojoomdar* v. *Rajaram Gope* (5). The ijara patta did not authorise the plaintiff to bring an action for enhanced rent.

Baboo *Doorgaram Bose* for the respondent.—A co-sharer in receipt of his separate share of rent can sue for enhancement without making co-sharers parties to the suit—*Rakhal Chunder*

(1) 12 B. L. R., 289; S. C., 21 W. R., 46.
(2) 11 W. R., 25.
(3) 8 B. L. R., 251; S. C., 15 W. R., F.B., 21.
(4) 10 W. R., 307.
(5) 22 W. R., 385.

1877

DOORGA PROSAD MYTEE v. JOYNARAIN HAZRAH.

Roy Chowdhry v. *Mahtab Khan* (1) and *Gunga Narain Das* v. *Saroda Mohan Roy* (2). The ijara patta contains no express stipulation precluding enhancement: the ijaradar may, therefore, sue for enhancement—*Rushton* v. *Girdharee Tewaree* (3).

PRINSEP, J.—The plaintiff, as ijaradar of a third share, sues for rent at an enhanced rate. After the determination of the rate to which he is entitled, the rent has been decreed by the Lower Appellate Court. In special appeal two objections are taken to this decision: first, that inasmuch as the plaintiff was only an ijaradar, he had no right to enhance the rent; and secondly, that as he held only a share in the rent, he could not enhance without making all his co-sharers parties to the suit. Another objection is taken that the defendants hold under a mokururee patta. But the finding of the Lower Appellate Court, that there is a total absence of satisfactory evidence with regard to the alleged mokururee tenure, completely disposes of this point. The law as laid down by the Lower Appellate Court that, unless there is an express stipulation against the enhancement of rent by an ijaradar, he can exercise that power, is in accordance with the law as laid down in the case of *Rushton* v. *Girdharee Tewaree* (4); and the correctness of that ruling cannot be disputed. On the other point, whether being an ijaradar he has the right to enhance without making the co-sharers parties, it seems to me that, as he had admittedly received a specific sum for rent originally, no doubt calculated on a specific share, but for a long time received independently of the other co-sharers, it was in no way necessary that he should make those co-sharers parties to this suit. The decision of a Full Bench of this Court in *Doorga Churn Surma* v. *Jampa Dossee* (4), does not appear to be in point; the facts as they appear in the judgment of Mr. Justice Jackson not being the facts that I have already stated. In that case it would seem that there was no separate collection of rents from the ryots on the plaintiff's share; but that the rents were col-

(1) 25 W. R., 221.

(2) 3 B. L. R., A. C., 230; S.C. 12 W. R., 30.

(3) Marsh., 331.

(4) 12 B. L. R., 289; S.C., 21 W. R., 46.

lected jointly on behalf of all the landlords. The law seems to have been clearly laid down in the case of *Gunga Narain Das* v. *Saroda Mohun Roy* (1), that if the plaintiff, landlord, either proves that the tenants have paid their rents to him separately, or proves an express agreement on their part to pay his rent separately, the suit will lie by that landlord having only a share in the absence of his other shareholders. And if he can bring a suit for arrears of rent on his specific share, there seems to be no reason why he should not be able to enhance that particular rent. The decision in *Dhookee Ram Sircar* v. *Gowhur Mundul* (2), as I read it, goes only so far as to state that, in order to arrive at a proper conclusion as to the amount of rent due to one having only a share in the property, the calculation must be based on an enhancement of the entire share; that the rent of the entire share should be enhanced as regards the payment of the full rent by the ryot does not appear to be necessary. In my opinion, therefore, there is no reason why the plaintiff who has himself, and whose lessor has also, realized rent separately from the ryot on his one-third share, should not be able to sue for rent at an enhanced rate, even although he may not have joined his co-sharers as parties to the suit. I find also that this opinion is in accordance with that expressed by Mr. Justice Glover in the case of *Rakhal Chunder Roy Chowdhry* v. *Mahtab Khan* (3). The special appeal will, therefore, be dismissed with costs.

Appeal dismissed.

(1) 3 B. L. R., A. C., 230; S.C., 12 W. R., 30.

(2) 10 W. R., 307.

(3) 25 W. R., 221.

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Where the administrator was sued, as representing the minor, by the mortgagee, and made no defence to the suit, and the property was sold, under a decree so obtained, to the mortgagee, by whom it was again sold to a third person, who knew that the administrator had executed the mortgage in that capacity,—*held*, that the decree did not protect the mortgagee who purchased at the Court sale, nor her vendee, from a suit by the minor for recovery of the property.
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BENG. ACT III OF 1864, ss. 2, 10, 11, 13, 15, 16, 57, AND 58—*Public Highways—Municipal Commissioners, power of, to close or divert a Public Highway—Calcutta Municipal Act (Beng. Act VI of 1863), ss. 109, 110.*] Beng. Act III of 1864, which vests public highways in Municipal Commissioners for the purposes of the Act, does not by so vesting them give power to the Municipal Commissioners, nor *a fortiori* to the Vice-Chairman alone, to stop up or divert such public highways.
EMPRESS ON THE PROSECUTION OF JODOONATH GHOSE *v.* BROJONATH DEY 425

——————— VIII OF 1869, ss. 2, 21, 22, AND 52—*Ejectment—Arrears of Rent—Bhaoli Rent.*] Under the provisions of Beng. Act VIII of 1869, a suit in ejectment will lie for arrears of rent due on a bhaoli tenure.
A suit which is in reality a claim for compensation for use and occupation of lands, cannot be described as a suit for arrears of rent under s. 52 of Beng Act VIII of 1869.
KISHEN GOPAL MAWAR *v.* BARNES 374

——————————————, s. 18 474
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——————— IV OF 1876, ss. 75, 79 290
See HIGH COURTS' CRIMINAL PROCEDURE ACT, s. 147.

BEQUEST TO A CLASS 262
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CALCUTTA MUNICIPAL ACT, ss. 75, 79 290
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CAUSE OF ACTION 445
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CERTIFICATE OF ADMINISTRATION 45
See LIMITATION ACT IX OF 1871, ARTS. 122 AND 145.

CHAMPERTY AND MAINTENANCE—*Agreements contrary to public Policy—Action for improperly putting the law in motion—Malice—Want of reasonable and probable cause—Application under s. 73, Act VIII of 1859—Costs.*] The English laws of maintenance and champerty are not of force as specific laws in India, either in the mofussil or in the Presidency towns. The ground on which contracts of the nature of champerty and maintenance should be held by the Indian Courts to be invalid is that they are contrary to public policy.
An agreement to supply funds to carry on a suit in consideration of having a share in the property if recovered, is not necessarily opposed to public policy, since cases may easily be supposed in which it would be in furtherance of right and justice that a suitor who has a just title to property, and no means to support it, should be assisted in this way. But agreements purporting to be made to meet such cases, when found to be extortionate and unconscionable, so as to be inequitable, or to be entered into for

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improper objects, as for the purpose of gambling in litigation, or of injuring others by encouraging unrighteous suits, are contrary to public policy, and ought not to have effect given to them.

Since by the law of India a champertous agreement does not constitute a punishable offence, an action in that country, founded on alleged champerty, to recover losses and costs incurred in litigation, cannot be sustained on the ground that a remedy by action accrues where an indictable offence has been committed.

No action will lie for improperly putting the law in motion in the name of a third party, unless it is alleged and proved that it has been done maliciously and without reasonable or probable cause. In the absence of such proof, an action for losses and costs incurred in defending a suit will not lie as against a person who is alleged to have been a mover in that suit, and to have had an interest in it, but who had not been made a party to the record, since such a state of things creates no legal privity from which a promise can be implied on which an action on contract can be founded, nor does it, *ex hypothesi*, constitute a legal wrong.

Where it appears that the plaintiff in a suit is in fact suing on behalf of another person who is not a party to the record, the ordinary practice is to require security for costs, and to stay the proceedings till it is given.

The rejection by the Court of an application under Act VIII of 1859, s. 73, to have a stranger, who has an interest in the suit, made a co-plaintiff on the record, cannot give a ground for an action against such stranger for costs incurred in the suit, which would not otherwise lie.

The cases in which persons other than parties to the suit have been held liable to costs in England, relate to applications either in the cause itself, or to the disciplinary and summary jurisdiction of the Courts. They give no support to the contention that an independent action will, under such circumstances, lie.

RAM COOMAR COONDOO *v.* CHUNDER KANTO MOOKERJEE ... 233

CIVIL PROCEDURE CODE (ACT VIII OF 1859), s. 2. ... 152, 222

See RES-JUDICATA.

———————————————, ss. 2 & 3 ... 283

See ACT XL OF 1858, s. 18.

———————————————, s. 26, CLS. 4 AND 5, AND SS. 135, 139, AND 141—*Amendment of Plaint—Allegations of Fact—Limitation—Act IX of* 1871, *s.* 19—*Personal Equity.*]

In 1817, the ancestor of the plaintiffs had obtained from the zemindar a maurasi istemrari lease of a certain portion of his property. In 1837, the entire zemindari was put up to sale for arrears of Government revenue, and was purchased by Government as the highest bidder, who thereupon granted a lease for a term of twenty years to *W*. This revenue sale was never set aside; but in 1842 the Government restored the estate to the Rajah zemindar with all the prior incumbrances, but subject to his confirming the lease to *W*. In 1844, the father of the plaintiffs brought a suit to recover possession of their tenure, but the suit was dismissed by the Principal Sudder Ameen, on the ground that the right to sue had not accrued, and could only arise on the expiration of the lease to *W*. This judgment was reversed by the Sudder Dewany Adawlut, but was restored and affirmed on appeal by the Judicial Committee. In the meantime, and before the expiry of the lease to *W*, owing to certain fraudulent transactions on the part of *A*, who had got into possession of the estate as the purchaser of the interests of certain mortgagees of the Rajah, the property was again put up to sale for

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arrears of Government revenue, and was purchased by *M*, a party to the transactions abovementioned. The Rajah, however, succeeded in getting this sale reversed in 1866, and obtained possession of his estate in 1871. In a suit, instituted on the 23rd October, 1873, against the Rajah and certain other parties, to whom he had granted a patni lease, the plaintiffs alleged that the sale of 1837 was set aside by Government as illegal, and that consequently their tenure had revived; that the effect of the Principal Sudder Ameen's decision, confirmed by the Privy Council, was to postpone their right to obtain possession of their tenure, until after the expiration of the lease to *W*; that when that lease expired, the property was in the possession of *M*, of the fraudulent character of whose title they had no knowledge; and that their right to sue in the present case consequently arose only in 1871. The defence was that the plaint disclosed no cause of action; that the cause of action, if any, was barred by the law of limitation; and that the tenure was destroyed by the proceedings connected with the sale in 1837, which was never set aside. The Judge held that the plaint disclosed a cause of action which arose in 1837, and that the suit was consequently barred. He accordingly dismissed the suit without taking any evidence.

On appeal to the High Court, it was admitted on the part of the plaintiffs that the sale of 1837 was never set aside; but it was contended that the restoration of the zemindari to the zemindar, "with all the former incumbrances," gave rise to an equity of a personal character against the Rajah, and those taking under him with notice of the plaintiffs' title, to restore the plaintiffs' tenure, which equity fastened upon him on his obtaining actual possession of the estate; and that, therefore, the cause of action accrued only in 1871. On the part of the defendants it was objected that the plaintiffs had no right to make a new case in appeal, and inasmuch as the equity, which was now sought to be fastened on the zemindar, was never raised in the pleadings, it could not now be set up. *Held* that, under ss. 139 and 141 of the Civil Procedure Code, the plaintiffs might be allowed to amend their case in any stage before a final decision: and inasmuch as, if the plaintiffs' case as so amended were proved, the suit would not be barred, it was necessary for the determination of the question of limitation that the case should be remanded to the lower Court for trial.

Semble.—S. 19 of Act IX of 1871 is applicable only to those cases where the fraud is committed by the party against whom a right is sought to be enforced.

From cls. 4 and 5 of s. 26 of Act VIII of 1859, it would appear that where a whole estate bearing a name is sued for, the boundaries need not be given.

Per MITTER, J. *Quære.*—Whether, if the plaintiffs' case were established, their claim would not be saved from the operation of the Law of Limitation by s. 29, Act I of 1845.

RAMDOYAL KHAN *v.* AJOODHIA RAM KHAN 1

CIVIL PROCEDURE CODE (ACT VIII OF 1859), s. 73—*Adding Parties—Amending Plaint.*] Under s. 73, Act VIII of 1859, a person is not liable to be added as a party to the suit, although he may be "likely to be affected by the result," unless he is also entitled to or claims some interest in the subject-matter of the suit.

KOEGLER *v.* PROSONNO COOMAR CHATTERJEE 472

——————————————, APPLICATION UNDER 233

See CHAMPERTY AND MAINTENANCE.

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CIVIL PROCEDURE CODE (ACT VIII OF 1859), ss. 102, 103, & 208 327
See RES-JUDICATA.

———————————————, s. 119—*Ex-parte Decree—Rehearing granted after expiration of time limited for Application.*] The plaintiff obtained an *ex-parte* decree on the 5th July, 1873, of which he took out execution on the 9th August. On the 11th of November, the defendant applied for and obtained a rehearing under s. 119, Act VIII of 1859. On the rehearing his suit was dismissed by both the lower Courts on the merits. *Held*, on a special appeal to the High Court, that although s. 119 provides that an order for rehearing shall be final, it is final only in the sense that it is not by itself open to appeal, and that the plaintiff was not precluded by that section from raising the objection that the order for rehearing was made after the time limited therein, and therefore ought to be set aside as made without jurisdiction.
RUNGLALL MISSER *v.* TOKHUN MISSER 114

———————————————, s. 170 222
See RES-JUDICATA.

———————————————, s. 243, POWER OF MANAGER APPOINTED UNDER 58
See STAMP ACT XVIII OF 1869, s. 3, CLS. 18 & 26, AND SCH. I, CL. 10.

———————————————, s. 308 389
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———————————————, s. 327 445
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See REGISTRATION ACT VIII OF 1871, s. 76.

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See PRIVY COUNCIL APPEALS ACT, ss. 8 & 11, CL. B.

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See STAMP ACT XVIII OF 1869, s. 29, & SCH. II, ART. 38.

COLLUSION AND FRAUD, MONEY OBTAINED BY ... 393
See LIMITATION ACT IX OF 1871, SCH. II, ART. 60.

COMPENSATION, PRINCIPLE ON WHICH IT IS TO BE GIVEN 103
See LAND ACQUISITION ACT.

COMPROMISE—*Appeal, Right of—Fraud.*] In a suit brought on behalf of an infant daughter by her mother as guardian, a decision was given partly for and partly against the defendant, who thereupon filed an appeal, which he afterwards withdrew in accordance with the terms of a compromise purporting to have been made with the mother and daughter. Subsequently, at the suit of the daughter, the compromise was set aside as fraudulent and collusive, and a review of the original decision, in so far as it was adverse to the plaintiff's interest, was allowed. The defendant then applied that his appeal might be revived, but his application was rejected by the High Court, on the ground that he had deprived himself of his

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opportunity of appeal by his own fraudulent conduct. *Held* by the Judicial Committee, that the effect of setting aside the compromise was to remit both parties to their original rights, and that if the plaintiff was to be allowed to be heard against so much of the original judgment as was unfavorable to her, the defendant must similarly be heard against so much of the same judgment as was unfavorable to him.

KHAJOOROONISSA *v.* ROUSHAN JEHAN 184

CONSIGNEE OF WEST INDIA ESTATE, LIEN OF 58

See STAMP ACT XVIII OF 1869, S. 3, CLS. 18 & 26, AND SCH. I, CL. 10.

CONTINUATION IN FORMA PAUPERIS OF PROCEEDINGS COMMENCED IN ORDINARY FORM 130

See SUIT IN FORMA PAUPERIS.

CONTRACT ACT (IX OF 1872), S. 74—*Promissory Note—Stipulation to pay Interest at high rate on default in payment of Note—Penalty.*] The defendant and one *D*, on the 6th April, 1875, gave to the plaintiff, a money-lender, a promissory note, by which they jointly and severally promised to pay the plaintiff on the 6th September Rs. 400 "for value received in cash in hand paid on signing and delivering this bond; should we neglect or fail to pay this amount on due date, then only shall it carry interest from and on due date to date of payment at the defaulting rate of 10 per cent, *per mensem*." At the date of the note, the defendant and *D* were in the plaintiff's debt in respect of other promissory notes, and a sum of Rs. 100 was deducted from the amount of the note of the 6th April, in respect of one of these which was given up and in respect of interest on three others. A further sum of Rs. 125 was deducted as interest in advance for the five months previous to the due date of the note, and the balance (Rs. 175) was paid by cheque to *D*. *D* died before the note became due. In a suit brought to recover Rs. 400 principal, and Rs. 400 interest, on the promissory note, on default being made in payment,—*held*, this was not a case in which a certain sum was agreed to be paid on a breach of contract, and therefore s. 74 of the Contract Act did not apply. The stipulation to pay interest at the "defaulting rate" was not in the nature of a penalty. *Held* also, that, looking at the nature of the transaction, the note contained a false statement of the consideration, which amounted only to Rs 275; and there being nothing to show that the defendant understood the real nature of the transaction, the rate of interest being exorbitant, and the consideration inadequate, the transaction was not one which ought to be enforced by a Court of Equity.

MACKINTOSH *v.* HUNT 202

CONVICTION ON CHARGE OF MURDER OF CULPABLE HOMICIDE NOT AMOUNTING TO MURDER 273

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), S. 272.

——————— OF OFFENCE COMMITTED BEFORE THE PENAL CODE CAME INTO OPERATION—*Reg. IV of* 1797—*Act XVII of* 1862—*Act I of* 1868 (*General Clauses Consolidation Act*), *s.* 6.] The prisoner was found guilty and sentenced under Reg IV of 1797 to transportation for life, for a murder committed in 1861, before the Penal Code came into operation, and the case was sent up to the High Court to confirm the sentence. Reg. IV of 1797 was repealed by Act XVII of 1862, and that Act was wholly repealed by Acts VIII of 1868 and X of 1872.

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Held, on a reference to a Full Bench, that the conviction was illegal, s. 6 of Act I of 1868, which provides that the repeal of any Act or Reg. shall not affect any offence committed before the repealing Act shall have come into operation, not being applicable.

EMPRESS *v.* DILJOUR MISSER 225

CO-SHARERS—*Izaradar—Enhancement of Rent—Beng. Act VIII of* 1869, *s.* 18.] An izaradar is entitled to enhance the rent of ryots holding under him where there is no condition or stipulation in his lease precluding him from so doing.

One of several joint proprietors may, without making his joint proprietors parties, bring a suit for enhancement of rent against ryots holding under him, from whom he has been in the habit of realizing separate rents.

The Full Bench Ruling in *Doorga Churn Surma* v. *Jampa Dossee* distinguished.

DOORGA PROSAD MYTEE *v.* JOYNARAIN HAZRAH 474

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See CHAMPERTY AND MAINTENANCE.

——— OF APPEAL, DEPOSIT OF 272

See PRIVY COUNCIL APPEALS ACT.

CREDITORS OF ALLEGED HEIR—*Application for grant of Probate—Succession Act (Act X of* 1865*), s.* 250.] A Hindu testator died, leaving *B*, alleged to be his adopted son, and *C*, who would be his heir in default of adoption. On application made by *B* for probate of the will after the usual notices, the creditors of *C* came in and opposed the grant of probate.

Held, under the Succession Act, as made applicable by the Hindu Wills Act, that the creditors were not parties having any interest in the estate of the deceased, and therefore were not entitled to oppose the grant of probate.

IN THE MATTER OF THE PETITION OF DESPUTTY SINGH, BAIJNATH SAHAI *v.* DESPUTTY SINGH 208

CRIMINAL PROCEEDINGS—*Irregularities—Effect of Waiver by Prisoner—Disqualifying Interest of Judge—Judge giving Evidence.*] The jailor of a district jail being accused by one of the jail clerks of falsifying his accounts and defrauding the Government, the matter was enquired into by the District Magistrate, and the jailor was, by the Magistrate's order, placed on trial before a Bench of Magistrates, consisting of the District Magistrate himself, *L*, the Officiating Superintendent of the Jail, and three other Honorary Magistrates. The prisoner and his pleaders were alleged to have stated before the commencement of the trial, on being questioned, that they had no objection to the composition of the Bench, but after the charges had been framed, the prisoner's Counsel objected to the Bench as formed. The District Magistrate directed the Government Pleader to prosecute, and both the District Magistrate and *L* gave evidence for the prosecution. After the case for the prosecution was closed, two formal charges were drawn up, namely, that the prisoner had debited Government with the price of more oil-seed than he actually purchased, and that he had received payment for certain oil at a higher rate than he credited to Government. The moneys, the receipt of which were the subject of the first charge, were obtained by the prisoner on the strength of certain vouchers which he had induced *L* to sign as correct, and *L* had sanctioned the sale at the rates credited to

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Government. Upon the prisoner's giving the names of the witnesses he intended to call in his defence, *L* was deputed by his brother Magistrates to examine some of them who were connected with the jail, in order "to guard against deviation," and the depositions so taken were placed on the record, "to be used by either party, though not themselves as evidence." The prisoner was convicted. On a motion to quash the conviction—

Held, that *L* had a distinct and substantial interest which disqualified him from acting as Judge.

Held further, that although a Magistrate is not disqualified from dealing with a case judicially merely because in his character of Magistrate it may have been his duty to initiate the proceedings, yet a Magistrate ought not to act judicially in a case where there is no necessity for his doing so, and where he himself discovered the offence and initiated the prosecution, and where he is one of the principal witnesses for the prosecution.

Held further, that the recording the statements of the prisoner's witnesses was irregular.

Criminal proceedings are bad unless they are conducted in the manner prescribed by law, and if they are substantially bad, the defect will not be cured by any waiver or consent of the prisoner.

QUEEN *v.* BHOLANATH SEN 23

CRIMINAL PROCEEDINGS, REVIVAL OF 405

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 215.

——— PROCEDURE CODE (ACT X OF 1872), ss. 56 and 222... 117

See MAGISTRATES, POWERS OF.

———, s. 215—*Discharge of Accused—Revival of Proceedings—Evidence—Magistrate—Competent Witness.*] It is illegal and *ultra vires* on the part of a Magistrate to revive before himself criminal proceedings against an accused, who has already been discharged under s. 215 of the Criminal Procedure Code, where no further evidence is procurable than that which was before the Court on the first occasion.

Per MARKBY, J.—When the discharge has been improper, the only proper course open to a Magistrate is to report the case to the High Court for orders, and that Court, if of opinion that the accused has been improperly discharged, will order a re-trial.

Per Curiam.—A Magistrate cannot himself be a witness in a case in which he is the sole judge of law and fact.

Per MARKBY, J.—Where in such a case he has given his evidence and convicted the accused, his having so acted makes the conviction bad.

Per PRINSEP, J.—The conviction is not absolutely bad. It is open to the Court to uphold the conviction, if it is of opinion that, after rejecting the Magistrate's evidence, there is other evidence sufficient if believed to support the conviction.

This being a proceeding under s. 297 of the Criminal Procedure Code, the Court refused to go into the evidence.

EMPRESS *v.* DONNELLY. IN THE MATTER OF THE PETITION OF DONNELLY 405

———, s. 272—*Appeal—Officer appointed to prefer Appeal—Judgment of Acquittal—Conviction on charge of Murder of Culpable Homicide not amounting to Murder—Acquittal.*] On the trial by a jury of a person on a charge of murder, the jury found the accused not guilty of the offence of murder, but convicted him of culpable homicide not

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amounting to murder. The Sessions Judge, although he disagreed with the verdict, declined to submit the case to the High Court under s. 263 of the Criminal Procedure Code. The Local Government, thereupon, directed the Legal Remembrancer to appeal under s. 272 of the Code, and in pursuance of this direction an appeal was preferred by the Junior Government Pleader. *Held*, that the appeal was duly made. *Held* further, that a judgment passed by the Court of Session, following the verdict of a jury acquitting the prisoner, is a judgment of acquittal within the meaning of s. 272. *Held* also, that there being an acquittal on the charge of murder, the appeal lay.

EMPRESS *v* JUDOONATH GANGOOLY 273

CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 272—*Appeal —Acquittal—Limitation—Act IX of* 1871, *s.* 5, *cl. b, and Sch. II, art.* 153—*Act XI of* 1874, *s.* 23] An appeal by the Local Government under s. 272, Criminal Procedure Code, is within time if presented within six months from the date of acquittal. The sixty days' rule does not apply.

EMPRESS *v.* JYADULLA 436

———————————————, ss. 294 and 297 —*Revision—Power of High Court—"Material Error."*] In a case of apprehended breach of peace, the Magistrate bound over the parties in sums of money aggregating on the whole to Rs. 60,000 or upwards. The High Court quashed the order, holding that it was altogether unreasonable.

Per MARKBY, J.—Ss. 294 and 297, Act X of 1872, do not debar the High Court from interfering where, in cases requiring the exercise of discretion, it appears upon the face of the proceedings that the Magistrate has exercised no discretion at all, or has exercised his discretion in a manner wholly unreasonable.

Per MITTER, J.—Under s. 297, the High Court has the power of interfering with judgments, sentences, or orders of Courts subordinate to it, if there has been a material error in any judicial proceeding of such Courts, meaning thereby any error appearing on the face of a judicial proceeding resulting in an unjust order.

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See SUPERINTENDENCE OF HIGH COURT.

———— TRESPASS—*Infringement of exclusive right of Fishery in public river—Penal Code, s.* 447.] The unlawful infringement of a right of exclusive fishery in a part of a public river is not an offence which can be brought within the definition of 'criminal trespass' in the Indian Penal Code.

EMPRESS *v.* CHARU NAYIAH 354

CULPABLE HOMICIDE, CONVICTION OF, ON CHARGE OF MURDER 273

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See SALE IN EXECUTION OF DECREE AGAINST REPRESENTATIVE OF DECEASED MAHOMEDAN.

DECLARATION OF TITLE—*Adverse Possession—Case made in Plaint—Issues.*] A declaration of title may be made upon proof of twelve years' adverse possession. Such declaration cannot, however, be given on a title not distinctly stated in the plaint or in the issues.
SHIRO KUMARI DEBI *v.* GOVIND SHAW TANTI 418

DECREE AGAINST MORTGAGED PROPERTY, FORM OF—*Execution of Decree.*] Where a decree is against the mortgagor generally, coupled with a declaration of the lien, the decree-holder may proceed either against the person and his property or against the mortgaged property, though whether such a course will be allowed in any particular case is a matter for the discretion of the Court executing the decree.
LUCHMI DAI KOORI *v.* ASMAN SING 213

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GUARDIAN, APPOINTMENT OF — *Infant — Power of High Court—Application by Petition without Suit.*] On an application made on petition without suit for the appointment of a guardian of the person and property of an infant, the Court Receiver was appointed Receiver, and the property was ordered to be handed over to him with liberty to him to sell it and invest the proceeds in Government paper, and the matter was referred to the Judge in Chambers for enquiry as to the proper person to be appointed guardian.
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HIGH COURTS' CRIMINAL PROCEDURE ACT (X OF 1875), s. 147—*Transfer of Case before Police Magistrate to High Court—Power to issue Mandamus.*] A charge was made against the accused of using criminal force under s. 141 of the Penal Code. The Police Magistrate heard the evidence for the prosecution, and without disbelieving it, decided it did not amount to the offence charged. *Held* that, assuming that an error of law had been committed, the High Court had no power to issue a *mandamus* to the Magistrate to commit the defendants: it was not a case where the Magistrate had declined jurisdiction; he had exercised his jurisdiction and heard the case. *Held* also, it was not a case which the Court could transfer under s. 147 of the High Courts' Criminal Procedure Act.
IN THE MATTER OF THE EMPRESS ON THE PROSECUTION OF MALCOLM *v.* GASPER 278

——————— *Acquittal — Presidency Magistrates' Act (IV of 1877), s. 181—The Calcutta Municipal Act (Beng. Act IV of 1876), ss. 75, 79.*] The powers of interference given to the High Court by s. 147 of the High Courts' Criminal Procedure Act, were not intended to be exercised in the case of an acquittal by the Magistrate, but only in the case of convictions or other orders whereby a defendant is aggrieved or injured.
THE CORPORATION OF CALCUTTA *v.* BHEECUNRAM NAPIT *alias* BHEECUN NAPIT 290

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HINDU LAW 262
See PARTITION.

———————*Adoption—Hindu Widow with permission to adopt, Position of—Divesting of Property.*] A Hindu testator died, leaving all his property to *P* and *B*, his two sons, absolutely, in equal shares. *B* died in 1845, leaving a minor son, *K*. *P* died in 1851 without male issue, leaving a widow *B D*, and a daughter. *P* also left a will, by which he gave, subject to certain trusts for the worship of the family idols, all his property to his widow *B D*, for her life, and on her death to his daughter's son (if any): the daughter died without issue before her mother. *B D* died in October 1864, leaving a will, of which she appointed her brother *G* executor, and *G*, in accordance with the directions in her will, took possession of the property which *B D* took as widow and under the will of *P*. *K* died in 1855, when still a minor, leaving a minor widow, and having made a will, by which he gave permission to his widow to adopt a son. The widow of *K* adopted a son in August, 1876. In a suit brought by the plaintiff as adopted son of *K* and heir of *P* to recover the property left by *P*, the issue was raised whether, assuming the plaintiff to be the legally adopted son of *K*, he was the heir of *P*. *Held*, that his adoption not having taken place when the succession to the property of *P* opened out on the death of *B D*, he was not entitled to the property; his adoptive mother could not claim on the death of *B D* to hold the property as trustee for the plaintiff: and inasmuch as the property must have vested in some one on the death of *B D*, and property once vested cannot, by Hindu law, be divested, the plaintiff was not entitled to succeed.

KALLY PROSONNO GHOSE *v.* GOCOOL CHUNDER MITTER ... 295

———————*Eldest Son, Adoption of—Shebaitship—Succession of a Hindu Widow as Shebait—Special Custom.*] In a suit by a Hindu widow to recover possession of certain property dedicated to idols, as heir to her deceased husband, the last shebait, it appeared that the plaintiff's husband was an adopted son of his predecessor in office, and that he was the eldest son of the first defendant who was the nearest male cognate of the adoptive father. On behalf of the defendant it was contended, (1) that the adoption of an eldest son was invalid, and that consequently plaintiff's husband did not succeed rightfully to the shebaitship; and (2) that the right of succession to a shebaitship was not governed by the ordinary rules of inheritance, and that the plaintiff had no title thereto. *Held*, that the adoption of an eldest son, where there are several sons, was not invalid by Hindu law. *Held* also, that a Hindu widow could not succeed to a shebaitship as heir to her husband without proof of special custom. In this case there was no sufficient proof of such custom.

JANOKEE DEBEA *v.* GOPAUL ACHARJEA 365

———————*Endowment—Powers of Shebait—Alienation—Notice to Purchaser.*] A plaintiff who seeks to set aside an alienation of lands on the ground that they are debutter, *i. e.*, dedicated in perpetuity to support the worship of an idol, must give strong and clear evidence of the endowment. The mere fact that the rents of a particular mehal have been applied for a considerable period to the worship of an idol, is not sufficient proof that the mehal is debutter.

The *shebait*, or manager, of a debutter estate has authority, where the purposes of the endowment require it, to raise money by

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alienating a part of the estate, his position being analogous to that of a manager of an infant heir under the Hindu law.

The written conveyance of certain lands stated them to be debutter, and to be alienated to raise money to repair the temple of the idol In a suit to set aside the alienation, it appeared that, at the time of the transaction, the temple required repairs, but that the vendor had not applied the whole of the purchase-money to that purpose. There being no evidence of any collusion on the part of the purchaser, or that he was aware at the time of the purchase that the money was to be applied otherwise than the conveyance expressed,—*held*, that the sale was valid.

Even if it had appeared that the purchaser had notice that the whole of the purchase-money was not required for the purposes of the endowment, but that part of it was to be expended on other objects, an action would not lie to set aside the sale altogether, since the purchaser would be entitled to be reimbursed so much of the money as had been legitimately advanced.

KONWAR DOORGANATH ROY *v.* RAM CHUNDER SEN 341

HINDU LAW — *Inheritance — Brother—Nephew—Mitakshara—Joint undivided Family.*] Where, in an undivided Hindu family living under the Mitakshara law, a person dies without leaving issue, but leaving a brother and a nephew, the son of a predeceased brother, the latter is not excluded from succession by the former.

BHIMUL DOSS *alias* LALL BABOO *v.* CHOONEE LALL ... 379

——————, MITAKSHARA 149
See PARTIES.

——————————*Purchaser at sale in Execution of Decree of Joint Family Property—Usurious Rate of Interest.*] In a suit by a Hindu subject to the Mitakshara law, against certain auction-purchasers at a sale in execution of a decree against the father, to recover a portion of the ancestral estate by cancellation of the sale, it appeared that the property which was mortgaged by the bond upon which the decree was passed was not put up for sale. The decree provided "that the plaintiff recover the amount with costs and interest, and that the decree be executed against the property specified in the bond," and it also allowed interest at about 50 per cent., the rate in the bond, to the decree-holders. It was contended on behalf of the plaintiff that, upon a proper construction of the Privy Council Ruling in *Muddun Thakoor* v. *Kantoo Lall*, the decree under which the property had been sold was an improper one. *Held* that, under the Privy Council Ruling, the purchaser is not bound to look beyond the decree. *Held* also, that an usurious rate of interest cannot be treated, within the principles of the above case, as showing that the decree was for a debt which the son was not bound to discharge.

LUCHMI DAI KOORI *v.* ASMAN SING 213

——————————————*Son's Interest in Ancestral Property—Mortgage by Father during minority of Sons.*] A Hindu, subject to the Mitakshara law, and forming with his sons a joint Hindu family, mortgaged certain ancestral immoveable property during the minority of his sons. In a suit by the mortgagee against the father and sons to recover the mortgage debt "by sale of the mortgaged property, and out of other properties, as well as from the person" of the father,—*held*, that it was incumbent upon the plaintiff to show for what purpose the loan was contracted, and that that purpose

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was one which justified the father in charging, or which the plaintiff had at least good grounds for believing did jusitfy the father in charging, the sons' interests in the ancestral immoveable property.
BHEKNARAIN SINGH *v.* JANUK SINGH 438

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See PARTITION.

——————, SUCCESSION OF, AS SHEBAIT 365
See HINDU LAW.

——————, SUIT BY, AS ADMINISTRATRIX OF HUSBAND LEAVING A MINOR SON.] A Hindu widow, who has obtained letters of administration from the High Court of the estate of her husband who has left a minor son, is not entitled in such character to maintain a suit with respect to immoveable property left by him. The Court refused to allow such a suit to proceed adding the son as a party, or to treat the plaintiff as manager of the infant, but dismissed the suit with costs.
KADUMBINEE DOSSEE *v.* KOYLASH KAMINEE DOSSEE ... 431

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——— WILLS, APPLICABILITY OF RULES OF ENGLISH LAW TO 262
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HUSBAND LEAVING A MINOR SON 431
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INCOMPETENCE, DISMISSAL FOR 33
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INFRINGEMENT OF EXCLUSIVE RIGHT OF FISHERY IN PUBLIC RIVER 354
See CRIMINAL TRESPASS.

INHERITANCE 379
See HINDU LAW.

INSOLVENT ACT (11 AND 12 VICT., C. 49), S. 24—*Order and Disposition.*] On the night previous to *B.'s* being adjudicated insolvent, about 10 P. M., the firm of *R. B. D.*, at their place of business, promised to give *B.* a loan of Rs. 5,000 if he would the next morning deliver to them goods to that amount, and would, in the meantime, satisfy them that he had sufficient goods in his godown, and allow the firm of *R. B. D.* to put their lock on the door of the godown to secure the goods until they had received the value of the loan. Thereupon *B.* took the gomasta of the firm of *R. B. D.* to his godown, let him see that it contained goods worth more than Rs. 5,000, and allowed him to put a lock on the door, *B.* at the same time replacing his own locks. The gomasta and *B.* then returned to the office of *R. B. D.*, where Rs. 5,000 were paid to *B.*, who promised to deliver the next morning Rs. 5,000 worth of

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goods out of the godown which had been locked up Having received the money, *B.* absconded from Calcutta that same night and never returned to his place of business. The next day he was adjudicated an insolvent. *Held*, that the goods in the godown were not in the order and disposition of *B.* within the meaning of s. 24 of the Insolvent Act.

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CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 215.

———, INTEREST DISQUALIFYING 23
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———, ORDER OF, SANCTIONING PROSECUTION 466
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SPECIAL APPEAL.

——————— *Cause of Action—Suit for Land—Letters Patent, 1865, cl. 12—Application to file Award—Act VIII of 1859, s. 327—Revocation of authority of Arbitrators.*] The plaintiff and defendant entered into partnership for the purpose of carrying on the cultivation and manufacture of tea, on a tea estate at Darjeeling, of which they were the owners in certain shares. The deed

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was executed and registered in Calcutta, but both the parties resided out of the jurisdiction. The deed contained provisions for a reference to arbitration in case of difference or dispute in any matters relating to the partnership. Differences having arisen, arbitrators were appointed in accordance with the clause in the deed. In the course of the arbitration proceedings, one of the arbitrators received two telegrams purporting to be sent by the plaintiff and defendant to the arbitrators, the terms of which were "stay further proceedings; arrange matters here." The arbitrators subsequently made their award in Calcutta to the following effect: That the defendant's share in the partnership property should stand charged with the payment of a certain sum found to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff as security for such payment; that the partnership should be dissolved on certain terms, and that the tea garden at Darjeeling should be sold in Calcutta. In an application, under s. 327, Act VIII of 1859, to file the award,—*held*, affirming the decision of the Court below, that the High Court at Calcutta had jurisdiction to file the award. S. 327 gives jurisdiction to file an award to any Court in which a suit in respect of the subject-matter of the award might be instituted. A suit in respect of the subject-matter of this award would not be a suit for land, but a suit in which, by reason of the execution of the deed of partnership in Calcutta, a part of the cause of action arose there; such a suit could, with leave, have been instituted in the High Court: that Court, therefore, had jurisdiction to file the award.

Held also, that the telegrams sent to the arbitrators did not amount to a revocation of their authority.

KELLIE *v.* FRASER 445

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See LIMITATION ACT IX OF 1871, SCH. II, ART. 113.

LAND ACQUISITION ACT (X OF 1870)—*Principle on which Compensation is to be given.*] Where Government takes property from private persons under statutory powers, it is only right that those persons should obtain such a measure of compensation as is warranted by the current price of similar property in the neighbourhood, without any special reference to the uses to which it may be applied at the time when it is taken by the Government, or to the price which its owners may previously have given for it. In accordance with this principle, the question for inquiry is, what is the market value of the property, not according to its present disposition, but laid out in the most lucrative way in which the owners could dispose of it?

IN THE MATTER OF THE LAND ACQUISITION ACT (X OF 1870).
PREMCHAND BURRAL *v.* THE COLLECTOR OF CALCUTTA ... 103

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LANDLORD AND TENANT—*Notice to Quit—Suit for Ejectment—Procedure.*] A ryot whose tenancy can only be determined by a reasonable notice to quit, expiring at the end of the year, can claim to have a suit for ejectment brought against him by his landlord dismissed on the ground that he has received no such notice.
RAJENDRONATH MOOKHOPADHYA *v.* BASSIDER RUHMAN KHONDKHAR 146

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See STAMP ACT XVIII OF 1869, S. 3, CLS. 18 & 26, AND SCH. I, CL. 10.

LIMITATION ACT (IX OF 1871), S. 4, EXPLANATION—*Petition in Formâ Pauperis—Act VIII of* 1859, *s.* 308.] *A* put in a petition to sue *in formâ pauperis* for possession of certain foreclosed property within the time specified by the Limitation Act, but on her failing to appear on two occasions when called upon to give evidence of her pauperism, the case was struck off so far as the application to sue *in formâ pauperis* was concerned. At the instance of *A* the case, however, was again reopened, and a date fixed for her appearance. Two days prior to this date, but at a time beyond the limit fixed by the Limitation Act, *A* put in a petition asking that the petition which she then made to have her suit proceed as an ordinary suit might be joined with her application to sue *in formâ pauperis*, and the suit be duly tried in the ordinary way. She also paid in the regular amount of stamp duty for an ordinary suit. On the point of limitation,—*held*, that the plaint must be considered as filed not on the day of filing the application to sue *in formâ pauperis*, but on the day on which the stamp duty was paid, and application made to have the suit tried in the ordinary way.
The explanation to s. 4 of the Limitation Act only applies in cases where, under s. 308 of the Civil Procedure Code, the application for leave to sue *in formâ pauperis* is granted, and the application numbered and registered as a suit.
CHUNDER MOHUN ROY *v.* BHUBON MOHINI DABEA ... 389

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See CIVIL PROCEDURE CODE (ACT VIII OF 1859), S. 26, CLS. 4 & 5; AND SS. 135, 139, & 141.

———————————, SS. 20, 21, SCH. II, ARTS. 167, 169—*Execution Proceedings*]. The word 'debt' in ss. 20 and 21 of Act IX of 1871 applies only to a liability for which a suit may be brought, and does not include a liability for which judgment has been obtained: therefore, where the last application for execution of a decree had been made on the 14th of December, 1872, and a notice under s. 216, Act VIII of 1859, issued on the 19th of January, 1873, and on the 28th of April, 1873, the judgment-debtor filed a petition notifying part-payment, which petition was signed by the

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judgment-creditor,—*held*, in an application for execution made on the 27th of April, 1876, that further execution was barred by limitation.

KALLY PROSONNO HAZRA *v.* HEERA LAL MUNDLE 468

LIMITATION ACT (IX OF 1871), SCH. II, ART. 14—*Suit to set aside a Sale—Purchase of Decree by Joint-debtor.*] *M* sold to *S* her rights under a decree for mesne profits which she had obtained against *A* and two other persons, and *S* thereupon proceeded to execute the decree against *A's* property, and that property was sold in execution of the decree purchased by *S*, and was purchased by *B*: but in a suit brought by *A* for a declaration that *S* was not the real purchaser, the Court found that *S* had in fact purchased the decree benami for *A's* two joint-debtors, and that consequently he had no right to execute it against the property of *A*. In a suit brought by *A* against *B* in 1874 for the purpose of recovering the property,—*held*, that the purchase of the benefit of the decree by *A's* joint-debtors, although it had the legal effect of satisfying the judgment-debt, did not affect the decree itself. The decree was not void, but only voidable, and the sale under it binding on *A*. The suit, therefore, was in effect a suit to set aside a sale under a decree within the meaning of cl. 14 of Sch. II of Act IX of 1871, and inasmuch as it was not brought within one year from the date of the sale, was barred.

ABUL MUNSOOR *v.* ABDOOL HAMID *alias* SABHAN MIAH ... 98

———————————————, ART. 60—*Money obtained by Collusion and Fraud.*] A suit for the recovery of money obtained by fraud and collusion is a suit for money received by a defendant for the plaintiff's use, and, therefore, under art. 60 of the second Schedule of Act IX of 1871, is barred unless brought within three years of the date when the money was received.

RAGHUMONI AUDHICARY *v.* NILMONI SINGH DEO 393

———————————————, ART. 113—*Specific Performance—Trust—Laches.*] In 1860, certain shares in a company then formed were allotted to *S*, on the understanding, as the plaintiffs alleged, that 120 of such shares should, on the amount thereof being paid to *S*, be transferred to, and registered in the books of the company in the names of, the plaintiffs. In 1862, the plaintiffs completed the payment to *S* in respect of the shares, and during his lifetime received dividends in respect of the said shares. *S* died in 1870, leaving a will, probate of which was granted to the defendant as his executor. In a suit brought by the plaintiffs after demand of the shares from the defendant, and refusal by him to deliver them, to compel the defendant to transfer the shares to the plaintiffs, and register the same in their names, the plaintiffs' case was, that the shares had been held in trust for them, and that, consequently, their suit was not barred by lapse of time. *Held*, that the transaction between *S* and the plaintiffs did not amount to "a trust for any specific purpose" within the meaning of s. 10 of the Limitation Act, or to a trust at all, but to an agreement of which the plaintiffs were entitled to specific performance; and the limitation applicable was that provided by cl. 113 of Sch. II, Act IX of 1871, and therefore the suit was not barred. Nor were the plaintiffs disentitled to relief by reason of any laches or delay in bringing the suit.

AHMED MAHOMED PATTEL *v.* ADJEIN DOOPLY 323

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LIMITATION ACT (IX OF 1871), SCH. II, ARTS. 122 & 145—*Will—Residuary Estate of Moveable and Immoveable Property—Express Trustee—Account—Multifariousness — Jurisdiction — Certificate under Act XIX of* 1841—*Act XXVII of* 1860, *s.* 2—*Suit by Hindu Widow without Certificate—Claims to Immoveable Property against Executors and Trustees.*] *Held*, that art. 122 of Act IX of 1871 applies to a suit for a share of the residue of a testator's moveable property disposed of by his will.

Held also, that if a testator appoints persons to be his executors and trustees, and directs them to do certain acts which can only be done by the owners of his residuary estate, the trustees will take that estate, though there be no express devise to them.

TREEPOORASOONDERY DOSSEE *v.* DEBENDRONATH TAGORE ... 45

——————————————, SCH. II, ART. 157—*Execution of Ex parte Decree.*] Notice of execution of decree is not sufficient "process for enforcing" it within the meaning of cl. 157, Sch. II, Act IX of 1871. Such process means actual process by attachment in execution of the person or property of the debtor.

POORNO CHUNDER COONDOO *v.* PROSONNO COOMAR SIKDAR ... 123

——————————————, ART. 167—*Application for execution of Decree—Suit.*] *Per* GARTH, C.J., and MARKBY and AINSLIE, JJ. (KEMP and MACPHERSON, JJ., dissenting).—The periods of limitation prescribed in Sch. II of Act IX of 1871 are to be computed subject to the provisions contained in the body of the Act.

An application made on the 8th January, 1875, to execute a decree, the last preceding application having been made on the 8th January, 1872, was held to be within the time allowed by art. 167, Sch. II, Act IX of 1871.

Per Curiam. The word 'suit' as used in the Act does not include 'applications.'

DHONESSUR KOOER *v.* ROY GOODER SAHOY 336

LUNATIC—*Security—Criminal Procedure Code (Act X of* 1872), *ss.* 426, 432—*Jurisdiction of Criminal Courts.*] The authority of the Criminal Courts over an accused, declared under s. 426 of the Criminal Procedure Code to be of unsound mind, ceases after the transmission of such accused to the place of safe custody appointed by the Local Government, and such authority can only be revived under the circumstances mentioned in s. 432.

EMPRESS *v.* JOY HARI KOR 356

MAGISTRATE AS WITNESS 405

See CRIMINAL PROCEDURE CODE (ACT X OF 1872), s. 215.

MAGISTRATES, POWERS OF—*Summary Jurisdiction—Transfer—Criminal Procedure Code (Act X of* 1872), *ss.* 56 & 222—*Furlough.*] The petitioner had been convicted by Mr. Carnegy, the Assistant Commissioner of Kamroop, in the exercise of a summary jurisdiction, under s. 222 of Act X of 1872. This officer was, in the year 1872, in charge of the Jorehaut Division in the District of Seebsaugor, "with first-class powers and powers under s. 222" of the Act. In 1874, he proceeded on furlough to England, and, on his return in 1875, was posted to the District of Kamroop, and invested with the powers of a Magistrate of the first class.

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Held, that s. 56 of Act X of 1859 did not apply, and that Mr. Carnegy had no summary jurisdiction in Kamroop.

Per MARKBY, J, on the ground that, by the terms in which the Government had conferred that jurisdiction on Mr. Carnegy, it had in effect 'directed,' within the meaning of s. 56 of Act X of 1872, that he should not exercise that jurisdiction anywhere but in Seebsaugor.

Per MITTER, J., on the ground that the office to which Mr. Carnegy was appointed in Kamroop was not equal to or higher than that which he had held in Seebsaugor.

Quære per MARKBY, J.—Whether the posting of Mr. Carnegy to Kamroop, after his return from furlough, was a transfer from Seebsaugor within the meaning of s. 56 of Act X of 1872?

IN THE MATTER OF PURSOORAM BOROOA 117

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See SALE IN EXECUTION OF DECREE AGAINST REPRESENTATIVE OF DECEASED MAHOMEDAN.

——————————— *Devolution of Property — Deed of Gift— Will—Presumption of Marriage.*] The policy of the Mahomedan law is to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs. But a holder of property may defeat the policy of the law by giving in his lifetime the whole, or any part, of his property to one of his heirs, provided he complies with certain forms. This may be done by a deed of gift without consideration, or by deed of gift for consideration. A conveyance by deed of gift without consideration is invalid, unless accompanied by delivery of the thing given so far as it admits of delivery. In the case of a gift for consideration, the delivery of possession is not necessary for its validity, and no question arises as to the adequacy of the consideration; but there must be an actual payment of the consideration by the donee, and a *bonâ fide* intention on the part of the donor to divest himself *in præsenti* of the property, and to confer it on the donee. It is incumbent on those who set up transactions of this nature, to show very clearly that the forms of the Mahomedan law, whereby its policy is defeated, have been strictly complied with.

By the Mahomedan law, a testator may bequeath one-third of his estate to a stranger, but cannot leave a legacy to one of his heirs without the consent of the rest. A will purporting to give one-third of the testator's property to one of his sons as his executor, to be expended at the son's discretion in undefined pious uses, and conferring on such son a beneficial interest in the surplus of such third share,—*held*, to be an attempt to give, under color of a religious bequest, a legacy to one of the testator's heirs, and to be invalid without the confirmation of the other heirs.

Where a son has been uniformly treated by his father and all the members of the family as legitimate, a presumption arises under the Mahomedan law that the son's mother was his father's wife.

KHAJOOROONISSA *v.* ROWSHAN JEHAN 184

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MASTER AND SERVANT—*Suit for Damages for wrongful dismissal —Incompetence—Rendering true and just Accounts—Warranty.*] The plaintiff, having obtained recommendations as a tea assistant in the defendant company's garden in Assam, came out to Calcutta, and, after some interviews with the defendants' agents there, entered into an agreement with the defendants to enter into their service as assistant in their tea gardens for a period of three years. The agreement stipulated that the plaintiff should, "when required to do so, render just and true accounts, and give every other particular and information of all moneys, &c., entrusted to him, or that may come into his possession, power, or custody or under his contol;" and it was also agreed that the defendants should "be at liberty to annul this agreement at any time for wilful misconduct of the plaintiff in not fulfilling the terms and conditions to be observed by him, or if he shall be prevented by reason of continued illness from attending to, or be hindered thereby in the performance of, his duties, or by reason of the bankruptcy, insolvency, or dissolution of the defendant company," and in those cases the salary was to cease, and the plaintiff be discharged from the defendant company's service. The plaintiff proceeded to Assam, worked for a short period in the defendants' garden, and was then dismissed from the company's service, on the ground of his incompetence. In an action brought for damages for wrongful dismissal, the Judge of the Small Cause Court was of opinion that, under the circumstances, there was no implied warranty on the part of the plaintiff of his competence, and the grounds for dismissal having been expressly stated in the agreement, the defendants were not justified in dismissing him on another ground, and therefore should not be allowed to give evidence of his incompetence. *Held*, on reference to the High Court, that the plaintiff, having expressly undertaken to render true and just accounts, his incompetence to do so would, if proved, be an answer to the action, and therefore the defendants ought to have been allowed to give evidence that he was incompetent. "True and just accounts" meant such accounts as an inexperienced assistant in a tea garden might reasonably be asked to render, and were not to be interpreted merely as an undertaking that the plaintiff would act honestly by his employers. *Held* also, that the agreement expressly stating the grounds of dismissal did not preclude the defendants from dismissing the plaintiff for incompetence.
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——————— *Reg. XVII of* 1806—*Service of Notice of Foreclosure.*] The provisions of s. 8 of Reg. XVII of 1806, that a copy of the mortgagee's application to foreclose is to be served with the Judge's perwanna referred to in that section, are imperative and not merely directory. Where the evidence fell short of proof that a copy of such application was served with the perwanna of the Judge,—*held*, that such failure of proof was fatal to the plaintiff's suit to recover possession of the mortgaged premises after the expiration of the year of grace.

Where the plaintiffs, second mortgagees, who had foreclosed their mortgagor's equity of redemption, sued for possession of the mortgaged property, and alleged that their mortgagor's equity of redemption had been finally foreclosed by the first mortgagee after due proceedings and expiry of the year of grace without redemption, and that they were, therefore, entitled to absolute possession, and failed on the ground that notice of foreclosure had not been duly served,—*held*, they were not entitled to a decree as mortgagees for possession, subject to their accounting to the mortgagors, that being relief different from that prayed for in their plaint.

THE BANK OF HINDUSTAN, CHINA, AND JAPAN, LIMITED, *v.* SHOROSHIBALA DEBEE 311

——————— BOND—*Interest after due date, Rate of.*] In a suit brought to recover the principal and interest due upon a written security given for the payment of the principal money on a day specified, with interest at a stipulated rate up to such day, the Court may, in its discretion, award interest on the principal sum from due date at such rate as it thinks fit, and is not bound to award such interest at the stipulated rate.

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PARTIES — *Hindu Law — Mitakshara — Joint Family — Suit by one Member for a specific Share.*] To a suit by one member of a Hindu joint family living under the Mitakshara law, for a specific share of the joint family property, all the members of the family are necessary parties.
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PARTITION—*Right of Hindu Widow to—Hindu Law.*] The question whether a Hindu widow is entitled to partition is one for the discretion of the Court in each particular case. In this case, where the plaintiff had daughters and grandsons, and the share she was entitled to through her husband was considerable, she was held entitled to a decree for partition.
SOUDAMINEY DOSSEE *v.* JOGESH CHUNDER DUTT 262

PENAL CODE, s. 277 — *Public Spring — Reservoir.*] The words public spring or reservoir used in s. 277 of the Indian Penal Code do not include a public river. The strewing of branches in a river for fishing purposes, *held* therefore to be no offence under that section.
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PRIVY COUNCIL APPEALS ACT (ACT VI OF 1874), s. 5—*Substantial Question of Law.*] The substantial question of law which, by s. 5, Act VI of 1874, the appeal must involve, in order to give an appeal to the Privy Council in a case where the decree appealed from affirms the decision of the Court below, is not limited to a question of law arising out of the facts as found by the Courts from whose decisions it is desired to appeal. A question of law arising on the evidence taken in the case is, without reference to the findings of the lower Courts, sufficient to found an appeal.
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———————————————————, ss. 8 & 11, CL. B—*Limitation Act (IX of 1871), s. 5—Practice—Closing of the Court—Deposit of Money under cl. c, s. 11, Act VI of 1874—Power of the Court to enlarge time.*] The petitioners had obtained a certificate on the 1st of September to appeal to Her Majesty in Council from a decision passed against them by the High Court on the 4th of May. Accordingly the period during which they were required to deposit the amount for the translation of the record, under s. 11, cl. *b*, of Act VI of 1874, expired on the

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4th of November. The offices of the Court re-opened after the vacation on the 23rd October, but the Benches did not begin to sit till the 16th November. On the last mentioned date, the petitioner brought in the money, and it was refused by the officer of the Court as being too late. *Held*, that it was rightly refused, and that the Court had no power to grant permission to deposit it after the prescribed time.

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PRIVY COUNCIL APPEALS ACT (ACT VI OF 1874), s. 11—*Deposit of Costs of Appeal—Power to enlarge Time—Practice.*] The requirements of s. 11, Act VI of 1874, as to the deposit of costs, are not absolutely imperative. The Court has power in its discretion to modify them, and when the period for making the deposit expires on a day when the offices of the Court are closed, it is a reasonable exercise of that discretion to allow the deposit to be made on the day they re-open.

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REGISTRATION ACT (VIII OF 1871), s. 76—*District Court—Order refusing Registration—Proceeding to compel Registration—Review—Act XXIII of* 1861, *s.* 38—*Act VIII of* 1859, *s.* 376.] The Registration Act of 1871 gives power to the Government to appoint districts and sub-districts for the purposes of registration; but the "District Courts" mentioned in the Act (except where the High Court when exercising its local jurisdiction is said to be a District Court within the meaning of the Act) must, in the case of a regulation province, be taken to import the ordinary Zillah Courts.

Semble.—The final words of the 76th section of the Registration Act, which declare that "no appeal lies from any order made under this section," apply to an order rejecting, as well as to an order admitting, an application for registration.

Quære.—Whether, after an order has been made under s. 76 of the Act rejecting an application for registration, it is open to the parties benefited by a deed to propound it in, and to obtain its registration by means of, a regular suit?

An order rejecting an application for registration under s. 76 of the Registration Act of 1871, being, in respect of the Court pronouncing it, a final order of adjudication between the parties, is so far in the nature of a 'decree' within the meaning of Act VIII of 1859, as to fall within the operation of the sections of that Act which provide for the admission of a review.

S. 38, Act XXIII of 1861, which enacts that "the procedure prescribed by Act VIII of 1859 shall be followed, as far as it can be, in all miscellaneous cases and proceedings which, after the passing of the Act, shall be instituted in any Court," renders the whole procedure of Act VIII of 1859, including the power of admitting a review, applicable to a proceeding to compel registration under the Registration Act.

It may be competent to a Judge to entertain an application for a review, although such application contains no distinct allegation of

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an error in law in the order sought to be reviewed, nor any suggestion of the discovery of new evidence.
IN THE MATTER OF THE PETITION OF HADJEE ABDOOLLAH REASUT HOSSEIN *v.* HADJEE ABDOOLLAH 131

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RES-JUDICATA—*Civil Procedure Code (Act VIII of* 1859), *s.* 2—*Former Suit to recover same Property on different grounds.*] Certain property, originally belonging to the husband of the plaintiff, was conveyed by him by deed of gift to his daughter, after her marriage with the defendant, as her stridhan. Some years after the daughter's death, the plaintiff brought a suit to recover the property, on the ground that the deed of gift was a forgery, and that she was entitled to the property as heiress of her husband; but her suit was dismissed, the deed of gift being found to be genuine. In a suit subsequently brought to recover the same property, on the ground that the plaintiff was heiress of her daughter,—*held* by the majority of a Full Bench (GARTH, C. J., dissenting), that the suit was barred.
DENOBUNDHOO CHOWDHRY *v.* KRISTOMONEE DOSSEE 152

——— *Act VIII of* 1859, *ss.* 2 *&* 170—*Hindu Widow—Reversioner.*] *A*, a Hindu widow, brought a suit to recover possession of her husband's share of certain joint property. After partially examining some of her witnesses, she cited the defendant as a witness, and on his failure to attend, her suit was dismissed. After the death of the widow, her daughter sued the same defendant on behalf of her two minor sons, as being entitled in reversion to their grandfather's share, to recover the share which was the subject of the former suit: the defendant was summoned as a witness, but failed to attend. *Held*, that the suit was not barred under s. 2, Act VIII of 1859, as being a *res-judicata*, until it was shown that the former decree had been obtained after a fair trial of the right, so as to bind not only the widow, but the reversioners.

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The defendant having failed to attend and give evidence on this point, the Court was justified in giving the plaintiff a decree under s. 170, Act VIII of 1859.

BRAMMOYE DASSEE ON BEHALF OF BROJO NATH SING *v.* KRISTO MOHUN MOOKERJEE 222

RES-JUDICATA—*Execution Proceedings—Act VIII of* 1859, *ss.* 102, 103, *&* 208—*Act XXIII of* 1861, *s.* 11.] The questions which, under s. 11, Act XXIII of 1861, may be determined by a Court executing a decree, must be between parties to the suit in which the decree was passed, and must relate to the execution of the decree.

A person who was not on the record when the decree was made, does not constitute himself a party to the suit by applying for execution, and a question as to his legitimacy is, consequently, not one which the Court executing the decree is competent to entertain. A declaration by a Court in execution proceedings, that a person not a party to the suit applying for execution is legitimate, since it is made without jurisdiction, cannot, under s. 2, Act VIII of 1859, be pleaded as a bar to a regular suit in which it is sought to establish the illegitimacy of the applicant.

Ss. 102 and 103 of Act VIII of 1859 relate only to proceedings prior to decree, and not to proceedings in execution.

S. 208 of the same Act does not apply where the person seeking to execute is not a transferee from the original decree-holder, either by assignment or operation of law. The section does not apply to cases where the right to an equitable interest in a decree is seriously contested; and was not intended to enable a Court to try, on an application for execution, such an important question as the legitimacy of an heir.

Since proceedings under s. 208, Act VIII of 1859, are, by s. 364 of the Act, not liable to appeal, a suit would, probably, lie to reverse an order passed therein.

ABIDUNNISSA KHATOON *v.* AMIRUNNISSA KHATOON 327

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REVOCATION OF AUTHORITY OF ARBITRATORS 445
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RULES OF ENGLISH LAW, APPLICABILITY OF, TO HINDU WILLS 262
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SALE IN EXECUTION OF DECREE—*Period from which Title of Purchaser dates—Confirmation of Sale—Liability of Purchaser for Government Revenue.*] The defendant became a purchaser at an execution-sale of a share of certain property, of which the plaintiff held another share partly as zemindar and partly as putnidar: the sale took place in September, 1872, but the defendant did not

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obtain possession until confirmation of the sale in May, 1873. Between the date of the sale and the confirmation, a considerable sum became due for Government revenue on the whole property, and to prevent its being sold, the plaintiff paid the whole of the revenue due. In a suit to recover the proportion due in respect of the share purchased by the defendant,—*held*, that, on confirmation of the sale, the share purchased by the defendant must be considered to have vested in her from the date of the sale; and, therefore, she was liable for the amount of Government revenue in respect of her share which became due between the date of the sale and its confirmation.

BHYRUB CHUNDER BUNDOPADHYA *v.* SOUDAMINI DABEE ... 141

SALE IN EXECUTION OF DECREE AGAINST REPRESENTATIVE OF DECEASED MAHOMEDAN—*Mahomedan Law—Debts—Purchaser of share of Estate, Right of.*] *B R*, a Mahomedan, had incurred debts for repairs to a house of which he owned an 8-anna share, and after his death, his daughter *S*, who was entitled to a 5-anna share of his estate, and who had taken charge of his property and obtained a certificate under Act XXVII of 1860, directed further repairs to be done to the estate. The debts then incurred by *B R* and *S* not having been paid, the creditor brought a suit against *S*, as representing her father's estate, to recover them, and having obtained a decree, the house was sold in execution thereof, and purchased by *H* in May, 1874. *B R* at his death left also a sister, who was entitled to a 3-anna share of his estate, but who had been for some years absent on a pilgrimage to Mecca. On her return she in January, 1874, sold her interest in the house to *M*. In a suit by *M* against *S* and *H* for possession of the share so purchased by him,—*held*, that *S* did not represent the whole estate of *B R*, and the share purchased by the plaintiff did not pass under the execution sale to *H*; the plaintiff, therefore, was entitled to recover.

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SATISFACTION OF DECREE AFTER ATTACHMENT, BUT BEFORE SALE 385
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SECURITY FOR GOOD BEHAVIOUR—*Criminal Procedure Code (Act X of 1872), s. 565.*] On a requisition from the High Court, a Magistrate is bound to state the grounds upon which he fixed the amount of security.

A person from whom security for good behaviour is demanded should have a fair chance afforded him to comply with the required conditions of security.

EMPRESS *v.* DEDAR SIRCAR 384

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SHERIFF—*Right to Poundage—Satisfaction of Decree after Attachment, but before Sale.*] Certain immoveable property of the defendant was attached in execution of a decree which had been partly satisfied by the proceeds of a previous sale in execution. Before any proceedings for sale were taken under the attachment, the defendant paid the balance and satisfied the plaintiff's claim in full. *Held*, that the Sheriff was entitled to poundage upon the amount so paid in satisfaction of the debt, and satisfaction of the decree was ordered to be entered, and the attachment withdrawn, subject to the payment of such poundage.
ROYCHURN DUTT *v.* AMEENA BIBI 385

SMALL CAUSE COURT 434
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SON'S INTEREST IN ANCESTRAL PROPERTY 438
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SPECIAL APPEAL—*Jurisdiction—Small Cause Court—Claim under Rs. 500—Question of Title—Act XXIII of* 1861, *s.* 27—*Act XI of* 1861, *s.* 6.] No special appeal lies to the High Court in a suit cognizable by the Small Cause Court, although a question of title to immoveable property has been raised and tried in the Court below.
MOHESH MAHTO *v.* SHEIK PIRU 470

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STAMP ACT (XVIII OF 1869), S. 3, CLS. 18 & 26, AND SCH. I, CL. 10—*Mortgage—Pledge of Property not in esse—Evidence Act (I of* 1872), *s.* 92—*Oral Agreement contradictory to Written Contract—Act VIII of* 1859, *s.* 243, *Powers of Manager appointed by Court under—Manager pending Suit or Administration appointed by Court of Chancery or High Court—Lien of Manager or Consignee of West India Estate—Salvage Lien—Estoppel, Knowledge and Acquiescence.*] *M*, the manager of an indigo concern, under s. 243, Act VIII of 1859, by a deed dated the 1st February, 1873, in which the owners of the concern joined, which was duly registered, and which was made with the Court's sanction, mortgaged the concern, and pledged and assigned the season's crop to *A* and *B*, who were pardanishins, to secure repayment of a large sum of money, consisting partly of the balance of previous loans from the husband of *A* and *B*, and partly of a new loan to the extent of what was described in the deed as the estimated outlay of the season. The deed provided that *A* and *B* should have a first charge upon the indigo to be manufactured in the season in respect of the moneys secured thereby; that the indigo should be sold subject to *A*'s and *B*'s direction; that until the debt was paid *M* should have no power

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to transfer, sell, or mortgage the properties thereby mortgaged, pledged, and assigned, or in any way to deal with the sale proceeds of the manufactured indigo; and that *A* and *B* should have full power to arrange for the appointment and dismissal of the servants of the concern, and for its better management. Previously to this, namely, in October, 1872, *M* had, in pursuance of his letter of appointment, filed an estimate for the season's outlay largely exceeding the sum mentioned in the deed as the estimated outlay, and had alleged that, at the time of executing the mortgage deed, he had informed one *C*, who was the general manager of *A* and *B*, and as such was the only medium of communication between *M* and *A* and *B*, that further advances would be necessary. According to *M's* account *C* told him that *A* and *B* were unable to make further advances, and that he could, if they were needed, obtain them on the usual terms from the plaintiffs, who were indigo brokers. In previous years, during the lifetime of the husband of *A* and *B*, who had held similar mortgages of the concern and of the crop in those years to secure advances made by him, such advances had, with the mortgagee's knowledge, been supplemented by loans obtained from the plaintiffs on the security of a first charge upon the crop to the extent of such loans. And it was alleged by *M* that it was upon the understanding that the same course was to be followed in the present instance that the mortgage deed to *A* and *B* was executed.

The moneys advanced by the latter were wholly expended by April, when *M*, without communicating with *A* and *B*, and with only the verbal sanction of the Court, applied to the plaintiffs for money, and on the 26th April, the plaintiffs wrote to *M* that they would make advances to the extent of Rs. 50,000, upon his assigning to them and giving them a first charge on the first 250 maunds of indigo to be manufactured in the season, and they enclosed a form of assignment for *M's* signature, which he duly signed, and returned to the plaintiffs on the 3rd May. This document bore a 2-rupee stamp. In September and October, *M* obtained further advances from the plaintiffs in respect of other indigo, giving them similar letters of assignment, which also bore 2-rupee stamps. Of the moneys thus advanced by the plaintiffs, Rs. 5,000 was paid to *C* for *A* and *B*, by a bill drawn upon the plaintiffs. About Rs. 17,000 was applied towards the expenditure of the following season, and the remainder was applied in the production of the then season's indigo, and *M* stated that without it he could not have manufactured any indigo whatever that season. The indigo, when manufactured, was claimed by *A* and *B* under their mortgage, and their claim being resisted by *M*, who set up against them the plaintiffs' rights under the letters of assignment, *A* and *B* brought a suit to enforce the provisions of their mortgage deed. In this suit the indigo was attached before judgment and sent to Calcutta for sale. The plaintiffs now sued *A*, *B*, *M*, and the holders for sale to establish their first charge in respect of their advances to *M* upon 360 maunds of the indigo on the strength of their letters of assignment.

Held per GARTH, C.J., and MACPHERSON, J., that the letters of assignment to the plaintiffs were not mortgages within the definition of the Stamp Act XVIII of 1869, and that the proper stamp to be affixed to such documents is a stamp of 8 annas.

Held per GARTH, C.J., and PHEAR and MACPHERSON, JJ., that the alleged oral agreement between *C* and *M* as to obtaining loans, if necessary, from the plaintiffs and giving them a first charge on the

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season's indigo in respect of such loans was in direct contravention and defeasance of the mortgage deed to *A* and *B*, and was therefore inadmissible in evidence under s. 92 of the Evidence Act.

Held per PHEAR, J., that s. 243, Act VIII of 1859, does not give the Court authority to appoint a manager to carry on a judgment-debtor's business pending execution proceedings and to invest him with power to raise money for that purpose. *Quære*—Whether the Civil Courts in the mofussil have the power possessed by the Court of Chancery in England and by the High Court in Calcutta of managing the property of parties to a cause pending suit or administration? But however this may be, the Court's manager, under such circumstances, only acquires a right to charge his costs and expenditure against the parties to the suit or persons who have knowingly placed themselves in a like position relative to his management, and even then he can only do so in respect of such expenditure as has been expressly sanctioned by the Court.

Held per GARTH, C. J., and PHEAR, J., that the plaintiffs were neither in the position of managers of the concern nor of consignees of the indigo, and were therefore not entitled to any lien upon the indigo similar to the lien possessed by the manager or the consignee of a West India Estate.

Held per PHEAR, J., that the plaintiffs could not claim a lien on the indigo on grounds of a salvage character; it being essential to such a lien that the person spending the money of which he claims reimbursement should have some interest in the property, or some right or duty towards the owners who are to be affected by the claim, impelling him to make the expenditure. A mere volunteer can in general claim no such lien.

Held on the facts *per* GARTH, C. J., and PHEAR and MACPHERSON, JJ., that there was not evidence of such knowledge and acquiescence on the part of *A* and *B* with respect to the advances by and the assignments to the plaintiffs as would estop them from disputing the plaintiffs' claim.

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STAMP ACT XVIII OF 1869, S. 29, AND SCH. II, ART. 38—*Instrument of Transfer—Prosecution by Collector—Intention to evade payment of Stamp Duty.*] The accused was prosecuted under Act XVIII of 1869, s 29, for executing a document on insufficiently stamped paper. The document recited that, "whereas *A* and *B* have sold to me 2 gandas 3 cowries of land under a kobala dated the 9th of Jeyt, 1283, in lieu of a consideration of Rs. 695, and whereas I have returned to the vendors in all 4 cottas of land worth about Rs. 25, and whereas in lieu of the said land the said vendors have given me 4 cottas of zerait land held by them, now I or my heirs shall have no objection or contest whatever in regard to the mutual exchange of lands between the vendors and me, the purchaser; hence I have executed this chitti by way of conveyance or deed of exchange, which may be of service when required." This document bore a stamp of eight annas, and it was executed only by the accused and presented by him for registration. *Held*, that the document was an instrument of transfer within the meaning of art. 38, Sch. II, Act XVIII of 1869. *Held* also, that a Magistrate is bound, for the purpose of ascertaining whether any and what penalty should be imposed, to consider whether a person prosecuted under s. 29, Act XVIII of 1869, had any intention to defraud by evading payment of stamp duty.

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———*Bequest to a Class—Remoteness—Applicability of English Rules to Hindu Wills.*] A Hindu testator died in 1837, leaving four sons and two grandsons by a deceased son. By his will, dated in 1837, after directing that his property should be divided into five shares, of which his four sons were to take one each, and his two grandsons the remaining one, the testator made the following devise: "On the death of any or either of my said four sons, or of the said *R.D.* and *M.D.* (his grandsons) leaving lawful male issue, such male issue shall succeed to the capital or principal of the share, or respective shares of his or their deceased father or fathers, to be paid or transferred to them respectively on attaining the full age of 21 years; but if any or either of my said four sons shall die without leaving any male issue, or if he or they shall die leaving such male issue, and the whole of such issue shall afterwards die under the age of 21 years, and without male issue, in such case the share or shares of my said sons so dying shall go to and belong to the survivors of my said sons and my said two grandsons for life, and their respective male issue absolutely after their deaths in the same manner and proportion as is hereinbefore described respecting their original shares." *U*, one of the sons, died in 1853, leaving an only son *S*, born in the lifetime of the testator, who died shortly after his father intestate, and without male issue. In a suit by the widow of *S* claiming as his heir and representative to recover the share of *U* as having descended to *S* absolutely, and to obtain partition,—*held* that, inasmuch as *U* survived the testator, the gift to the male issue of the testator's sons was void for remoteness as including objects who might have come into existence after the testator's death, and therefore be incapable of taking. The rule that where there is a gift to a class, and some persons constituting that class cannot take in consequence of remoteness, the whole bequest must fail, as well as the principle of the English Courts in deciding questions of remoteness, that regard is to be had to possible and not to actual events, is applicable to the interpretation of the wills of Hindus.

The gift to the male issue being void, the subsequent limitations were also void. *S*, therefore, and through him the plaintiff, was entitled to a share in such part of the testator's estate as by reason of the invalidity of the gifts in his will was undisposed of.

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